* Together with B.R.T. v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co. No. 501

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 500

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN & SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE MISSOURI PACIFIC RAILROAD COMPANY, NATCHEZ & SOUTHERN RAILWAY COMPANY, THE TEXAS & PACIFIC RAILWAY COMPANY, RALPH T. SEWARD, Chairman of Arbitration Board 282 and the UNITED STATES OF AMERICA, Intervenor,
Respondents.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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The long existing, extensive and continuing controversy as to the validity of awards by special boards of adjustment which arbitrated part of the "railroad work rules dispute" under P. L. 88-108 as delegatees of the arbitration board created by Congress without complying with the procedures established by P. L. 88-108 for the conduct of the arbitration and whether such awards would, if sustained, deprive petitioner and the railroad employees it represents of contract rights without due process of law should be resolved by this court in view of the vascillating, contradictory and belated opinions and decisions of the courts below, the last of which would, if sustained, preclude a determination of the controversy on its merits contrary to a prior opinion of the court below	8
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BROTHERHOOD OF RAILROAD TRAINMEN,
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v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN & SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE MISSOURI PACIFIC RAILROAD COMPANY, NATCHEZ & SOUTHERN RAILWAY COMPANY, THE TEXAS & PACIFIC RAILWAY COMPANY, RALPH T. SEWARD, Chairman of Arbitration Board 282 and the UNITED STATES OF AMERICA, Intervenor,
Respondents.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The Brotherhood of Railroad Trainmen respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 19, 1967, Court of Appeals Nos. 20,003 and 20,004.

OPINIONS BELOW.

The opinion of the District Court is reported at 248 F. Supp. 1008 (D. D. C. 1966), R. 150. The opinions of the Court of Appeals are not officially reported. They are unofficially reported at 65 LRRM 2367, and are appended hereto, the majority opinion as Appendix A, and the dissenting opinion as Appendix B. The opinions of the Court of Appeals in the companion case of *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Railway Co.*, are not officially reported. They are unofficially reported at 65 LRRM 2365.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered May 19, 1967. R. 182, Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1). (Appendix D.)

QUESTIONS PRESENTED.

1. Whether that part of the railroad "work rules" arbitration, ordered by Congress in Public Law 88-108 and which was delegated by the arbitration board [No. 282] established by Congress in that Act to "special boards of adjustment", which were provided for in the Award of Arbitration Board No. 282, was required to be conducted by such special boards in accordance with the procedures and within the procedural restrictions prescribed by Congress for the conduct of the arbitration; i. e., whether such "special boards of adjustment" were required to conduct the arbitration delegated to them in accordance with the procedures of Sections 7 and 8 of the Railway Labor Act to the extent Board 282 was required to do so and whether the awards of the special boards were subject to Section 9 of the Railway Labor

Act to the extent the Award of Board 282 was subject thereto.

2. Whether the judgment in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11 (D. C. D. C. 1964), *aff'd.* 331 F.2d 1020 (D. C. Cir. 1964), *cert. denied* 337 U. S. 918 (1964), prior to the establishment of any such "special boards of adjustment" or the commencement of any of their proceedings, and prior to any issue having arisen concerning what procedural requirements are applicable to such special boards, is *res judicata* of Question No. 1.

3. Whether a party aggrieved by the award of a special board of adjustment may complain of the failure of the board to conduct the arbitration as provided by Public Law 88-108 and Sections 7 and 8 of the Railway Labor Act, notwithstanding such party, believing the special board to be illegally constituted, did not participate in the proceedings of the board. (This question in this case does not arise in the petitions for certiorari filed this day by petitioner in other cases involving awards of special boards of adjustment.)

4. Whether the admitted failure of special boards of adjustment to comply with Section 4 of Public Law 88-108 and Sections 7 and 8 of the Railway Labor Act in conducting the arbitration delegated to them by the Award of Board 282 and the decisions of the Court below denying judicial review of the awards of special boards as provided by Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act deprive petitioner of contract rights without due process of law.

STATUTES INVOLVED.

The pertinent provisions of Public Law 88-108, 77 Stat. 132; 45 U. S. C. 157 (1966 Supp.), and the Railway Labor Act, 45 U. S. C., §§ 151 ff, are set forth in Appendix D, pp. 8a-13a.

STATEMENT.

This case is related to other cases in which petitions for writs of certiorari are being filed by petitioner. The other petitions relate to special boards on the St. Louis Southwestern R. Co. and Chicago, Milwaukee, St. Paul and Pacific R. Co. Another relates to the Terminal Railroad Association of St. Louis.

This case stems from Public Law 88-108, 77 Stat. 132, 45 U. S. C., § 157 (1966 Supp.), which was approved August 28, 1963 and was enacted to prevent the resort to "self-help" by the parties to a national railroad "work rules" dispute after this Court had determined in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Baltimore & Ohio R. Co., et al.*, 372 U. S. 284 (1963), that "self-help" was available to them. The act provided for the compulsory arbitration of two of several disputes, the "firemen on diesels"-issue and the "crew consist" dispute. It is the crew consist issue which is involved here, i. e., the number of employees required to be in road and yard service crews as distinguished from engine crews.

The Act provided for an arbitration board which has become known as "Arbitration Board 282". It made an award which, pursuant to the Act, was filed in the United States District Court for the District of Columbia and became effective on January 25, 1964. The constitutionality of the act and the validity of the award were upheld in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al.*, 225 F. Supp. 11 (D. D. C. 1964), *aff'd* 331 F. 2d 1020 (D. C. Cir. 1964), *cert. denied* 377 U. S. 918 (1964) (R. 10-11).

Section 3 of Public Law 88-108 provided that "[t]he arbitration board shall make a decision, pursuant to the procedures hereinafter set forth" as to the disposition to be made of those disputes and also provided in Section 4 that "[t]o the extent not inconsistent with this joint

resolution the arbitration shall be conducted pursuant to Sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to Section 9 of said Act" (App. D, p. 8a).

The Award made a "national rule" disposing of the "fireman issue" so that no further arbitration of that issue was necessary. However, as to the "crew consist issue", the Arbitration Board found that a national prescription of road and yard crew size would be wholly unrealistic, that the consist of crews necessary to assure safety and to prevent undue workloads was dependent upon a great complex of local factors and, therefore, should be determined by "special boards of adjustment" upon the basis of local conditions according to certain "guidelines" which were set forth in its Award (41 Lab. Arb. 693-694; R. 7-9).

Thus, Arbitration Board 282 itself made no change in the consist of any crew. Instead, it delegated its arbitral authority under the Act of Congress to special boards of adjustment and they conducted the arbitration of the dispute with which Congress was concerned.

The award provided a procedure for establishing special boards of adjustment but was silent as to the procedure to be followed by a special board in conducting the arbitration delegated to it (R. 6-7).

The awards of all four special boards here involved authorized reductions in the number of employees theretofore required to be in crews to the full extent proposed by the railroads and permitted by the Award of Board 282 (R. 72-103). Special boards convened on other railroads did likewise as is shown by the records in the cases in which a petition for a writ of certiorari is being filed concurrently herewith.

Admittedly the special boards here involved did not take evidence under oath or affirmation and did not make, certify or file a transcript of their proceedings and the evidence taken by them as provided for by Public Law 88-108 and Section 7 Third (f), (h) and Section 8 (k) of the Railway Labor Act in conducting the arbitration delegated to them (R. 19, 69-70).

When the railroads announced their intention of putting the special board awards into effect petitioner promptly instituted a proceeding challenging the validity of the awards on various grounds including the failure of the special boards to follow the procedures and to comply with the procedural restrictions imposed by Congress on the conduct of the arbitration and the denial to the Brotherhood and those it represents of due process by the special boards having proceeded as they did. Proceedings were first instituted in the United States District Court for the Eastern District of Missouri, in which is located the railroads' headquarters, the special board award not having been filed in any court or elsewhere (R. 19). *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co.*, 230 F. Supp. 197 (1964). (Pending on cross appeals and stipulation of the parties in the U. S. Ct. of App., 8th Cir., Docket Nos. 17724 and 17749.) That Court held (230 F. Supp. at 201) that since the authority of the special boards stemmed from Award 282, the determinations of the special boards must be deemed part of the arbitration submitted to Board 282 and that, therefore, judicial review of the awards of the special boards was limited to the United States District Court for the District of Columbia in accordance with Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act. It therefore dismissed the proceeding for lack of jurisdiction.

Thereupon, the Brotherhood instituted proceedings in the District of Columbia. The District Court held that

the special boards were not required to follow the procedures of Sections 7 and 8 of the Railway Labor Act and in effect that their awards were not subject to judicial review under Section 9. *In Re Certain Carriers, etc.*, 231 F. Supp. 519 (D. D. C. 1964). That decision was appealed to the United States Court of Appeals for the District of Columbia Circuit. While the appeal in that case was pending, the Court of Appeals decided *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. P. & P. R. Co.*, 345 F. 2d 985 (1965), in which it held that awards of special boards of adjustment under Award 282 were subject to a "meaningful review" by Board 282 initially and thereafter were subject to judicial review under Section 9 of the Railway Labor Act which had been incorporated by reference into Public Law 88-108. Thereafter, when the Court of Appeals first decided this case, it held that its decision in the *Milwaukee* case was determinative and that the question of the validity of the awards of the special boards of adjustment here involved was within the primary jurisdiction of Board 282. The Court remanded so the questions could be submitted to Board 282. *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, 349 F. 2d 207, 210 (1965).

A number of questions were submitted to Board 282 including the question of whether the special boards of adjustment provided for in Award 282 were required to follow the procedures of Sections 7 and 8 of the Railway Labor Act as provided by Public Law 88-108. Board 282 issued an opinion stating that the special boards were not required to follow those procedures (R. 54, 57-64, 66-71).

Two actions were then instituted by petitioner in the United States District Court for the District of Columbia to review and set aside, on identical grounds, the awards of the special boards and the ruling by Arbitration Board

282. The United States intervened, the actions were consolidated and thereafter have proceeded as a single action (R. 46, 108, 117, 126-127, 130-133). The District Court held that the special boards were not governed by the procedures of Sections 7 and 8 of the Railway Labor Act nor were their awards subject to Section 9 as provided by Public Law 88-108.[1] *In Re Certain Carriers, etc. and Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul and Pacific R. Co., et al.*, 248 F. Supp. 1008 (D. D. C. 1966).

On appeal, a majority of the Court of Appeals did not pass on the applicability of Sections 7 and 8 of the Railway Labor Act. It held that the issue was *res judicata* because petitioner had not raised the issue in the initial action seeking to impeach the original Award of Board 282, before there were any special boards of adjustment under that Award and before the question of any procedural restrictions on the special boards had arisen (R. 10-11, 72, 82-83, 91-92, 100-102, App. G, p. 18a). It held also that the Brotherhood was precluded from raising any question of the procedural adequacy of the proceedings of the special boards by its having failed to participate in those proceedings. App. A, p. 1a.

Circuit Judge Wright dissented for the reasons set forth in his dissenting opinion in *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Ry. Co.*, decided the same day, in which case a petition for a writ of certiorari is also being filed this day, in which case the Brotherhood did participate in and object to the proceedings of the special board there involved. In that dissent he considered that since Congress, conscious of the seriousness of its action in imposing compulsory arbitration, had provided

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[1] Section 9 provides for setting aside awards on limited grounds but including the ground that the proceedings were not in substantial conformity with the procedures required by Sections 7 and 8.

mandatory procedural due process safeguards for the arbitration, it was inconceivable that Board 282 could delegate its arbitral authority to local boards without such safeguards being applicable to the local boards. He considered the ruling of the majority concerning *res judicata* was inconsistent with the decision of that Court in *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, 349 F. 2d 207 (1965), in which case the Court, two years earlier had, *sub silentio* rejected the *res judicata* argument and remanded the parties to further proceedings under Public Law 88-108 and thereafter Section 9 of the Railway Labor Act. App. B, p. 6a.

REASONS FOR GRANTING THE WRIT.

Considerable controversy has been generated over the nature and legal status of the special boards and the awards which they have made (R. 59). That "considerable controversy" is further attested by the litigation involving them.

While only four special boards are directly involved in this case and only one in each of *Brotherhood of Railroad Trainmen v. St. Louis, Southwestern R. Co.*, and *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. P. & P. R. Co.*, in which petitions for writs of certiorari are also being filed, the decision in this case may well affect many others. About two hundred railroads, together with petitioner and other unions representing operating employees were parties to Public Law 88-108 and the Award of Arbitration Board 282. *In Re Certain Carriers, etc.*, 231 F. Supp. at 520, *supra*. About ninety special boards made awards, as noted by the District Court in *Akron & Barberton Belt R. Co., et al. v. Brotherhood of Railroad Trainmen*, 252 F. Supp. at 209. More specifically it appears from a stipulation to which the court referred in that case and to which petitioner and respondent railroads were parties (App. G, p. 18a),

and, as is also shown by the record in this case, more than one special board was convened and made an award on a single railroad or railroad system so that the nature and legal status of some eighty-three special boards on about forty railroads or railroad systems employing thousands of men actually are involved (R. 72, 83, 92, 101).

Reductions in the number of employees in crews in road and yard service pursuant to special board awards necessarily resulted in a change in the daily working conditions of those thousands of railroad employees who work in those reduced crews and of those who were deprived of work as shown in *Brotherhood of Railroad Trainmen v. Terminal Railroad Association of St. Louis,* filed concurrently herewith.

The controversy over the nature and legal status of the special board awards has been aggravated by the decision of the United States District Court for the District of Columbia, now affirmed to the extent that it held that special board awards continue beyond the expiration of Public Law 88-108 and the Award of Arbitration Board 282 until changed in accordance with the provisions of the Railway Labor Act. *Akron & Barberton Belt R. Co., et al. v. Brotherhood of Railroad Trainmen et al., supra,* and *Brotherhood of Railroad Trainmen et al. v. Akron & Barberton Belt R. Co. et al.,* Nos. 20,152, etc., United States Court of Appeals for the District of Columbia Circuit, May 12, 1967 and July 31, 1967.

The controversy as to the nature and legal status of the special boards and their awards has been compounded by the confusion resulting from the vacillations and conflicting decisons of the courts which have considered the controversy, particularly those of the Court below.

The question of whether the contract rights of petitioner and the working conditions of the thousands of employees it represents may be changed by compulsory arbitration by tribunals purportedly acting under Public Law 88-108

without such tribunals complying with the due process procedural safeguards imposed by Congress in that Act, obviously, is a far reaching question of fundamental importance. The mistaken application by the majority below of the principle of *res judicata* does violence to that principle; it holds that the question of procedural requirements and limitations of the special boards is *res judicata* because not raised in an earlier proceeding, before there were any special boards and before any such procedural question had arisen, because petitioner should have foreseen that such question would arise. And the question of whether procedural due process limitations must be met in taking away contract rights, regardless of whether the possessor of those rights refuses, mistakenly perhaps, to participate in the proceedings, is likewise fundamental.

Unquestionably, if Board 282 itself had made the determinations made by the special boards, instead of delegating the arbitration to special boards, its action would be invalid if it did not comport with the procedural prescription of Public Law 88-108. And this would be so whether or not petitioner participated in the proceedings; the authority of Board 282 to do anything having been limited by how Congress, its creator, said it should act.

When petitioner first challenged awards of special boards on the grounds here involved the Court denied jurisdiction because it considered special board awards to be subject to initial review by Board 282 under the provisions of Section 4 of Public Law 88-108 and Sections 7 and 8 of the Railway Labor Act and thereafter by the United States District Court for the District of Columbia under Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act, the Award of Arbitration Board 282 having been filed in that court pursuant to Public Law 88-108. *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co. et al.*, 230 F. Supp. 197, 201 (1964) (Pending on cross appeals and stipulation of the parties in the U. S. Ct. of App., 8th Cir., Docket Nos. 17724 and 17749).

Immediately thereafter the United States District Court for the District of Columbia ruled that special boards were not required to comply with Sections 7 and 8 of the Railway Labor Act and their awards were not reviewable under Section 9 of the Railway Labor Act, notwithstanding the provisions of Section 4 of Public Law 88-108. *In Re Certain Carriers, etc.*, 231 F. Supp. 519 (D. D. C. 1964).

While petitioner's appeal from that decision was pending, the Court below decided *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 345 F. 2d 985 (1965) and ruled that special boards were subject to the same procedural limitations and the same judicial review as was Board 282 and its Award in addition to and after initial review by Board 282. This ruling was in accord with the opinion of the District Court in Missouri in *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co. et al., supra.*

Now, as hereinafter shown, the majority of the Court below holds that judicial review may never be had.

Shortly after the decision of the *Milwaukee* case this case was decided for the first time by the Court below and the Court ruled that the *Milwaukee* case was determinative and in accordance with it remanded the case so that the question could be submitted to Board 282 for initial review. *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, 349 F. 2d 207 (1965).

Although the applicability of Sections 7, 8 and 9 of the Railway Labor Act under Public Law 88-108 and due process in the arbitration conducted by special boards are solely questions of law, petitioner sought review by Board 282 pursuant to those opinions and decisions of the court below (R. 54 ff).[1]

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[1] Previously, in May 1964, petitioner had sought a ruling by Board 282 whether the provisions of Sections 7, 8 and 9 of the

When the question was submitted to Board 282 in pursuance of the opinions of the Court below in the *Milwaukee* case and in this case, that Board ruled that special boards were not required to comply with Sections 7 and 8 of the Railway Labor Act in conducting the arbitration delegated to them (R. 57-64, 66-71).

Thereafter petitioner sought judicial review under the opinions of the Court below in the *Milwaukee* case and in this case when it was first before the Court below. The District Court sustained the special board awards and the rulings of Board 282, holding that none of the provisions of the Railway Labor Act were applicable to special boards. *In Re Certain Carriers, etc.*, 248 F. Supp. 1008 (D. D. C. 1966).

In the ensuing appeal the majority of the Court below now holds that the judicial review previously held to be available with respect to special board awards under Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act cannot be had because the question whether special boards were required by Public Law 88-108 to comply with the procedures provided by Sections 7 and 8 of the Railway Labor Act for conducting an arbitration has been *res judicata* since before the first decision of the Court of Appeals on the issues involved in this case—indeed, since before any special boards existed or convened or could have existed or convened (App. G, p. 18a)—even though the Court of Appeals in both earlier decisions had presented to it the carriers' argument of *res judicata* and *sub silentio* rejected it. App. B, p. 7a, n. 4.

As the dissenting judge below pointed out (Appendix B, p. 6a), the requirement that the arbitration be conducted

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Railway Labor Act were applicable to special boards. Board 282 refused to answer the question and referred the parties to the opinion of the District Court in *In Re Certain Carriers, etc.*, 231 F. Supp. 519, *supra*. App. F, p. 17a.

in accordance with the proceedures of Sections 7 and 8 of the Railway Labor Act was mandatory. This is in accord with the mandatory language of Section 4 of Public Law 88-108 that the arbitration thereunder "shall be conducted pursuant to Sections 7 and 8 of the Railway Labor Act", which also, mandatorily, provide that arbitration boards "shall" follow specified procedures. The mandatory nature of those procedures is further reinforced by the provisions of Section 9 Third of the Railway Labor Act. Although it affords very limited grounds for impeaching an arbitration award it does include, as one such ground, the ground that the proceedings were not in substantial conformity with the Railway Labor Act, i. e., Sections 7 and 8 and Section 9 Fourth provides that, if any part of an award is invalid on such ground, the entire award "shall" be set aside.

Arbitration Board 282 and its delegates, the special boards, had no authority to proceed to any determination without proceeding as directed by Congress. The authority to proceed was not enlarged by the absence of petitioner. Surely, if Board 282 in conducting the initial proceeding under Public Law 88-108 had proceeded other than as directed by Congress and petitioner had not participated in the proceedings but nevertheless had its rights determined, petitioner could still have sought impeachment of the award on the ground that it was arrived at unlawfully or without authority, and would not be precluded by not having participated in the proceedings before the Board. The rights of petitioner and the rights of those it represents can no more be taken away by the special boards without following the prescribed procedures simply because petitioner was absent. The view of the majority of the court below that petitioner may not complain of the failure of the special boards to proceed as required by Public Law 88-108 ignores the mandatory

language by that law and sections 7, 8 and 9 of the Railway Labor Act and is based, in part, on cases arising under the inapplicable Administrative Procedures Act such as *United States v. Tucker Truck Lines* (Appendix A, p. 4a, n. 7). Cf., *In Re Certain Carriers, etc.*, 225 F. Supp., *supra*, at 18.

Public Law 88-108 and the sections of the Railway Labor Act which it adopted for the conduct of the arbitration placed the duty of fulfilling the procedural requirements upon the arbitration board. The obligation of the board was not made to depend upon the presence or absence of one party to the proceeding.

The majority of the Court of Appeals appears to have considered petitioner's complaints concerning the conduct of the arbitration by the special boards as an attempt to relitigate the validity of the Award of Board 282. They are not. They have been and are based upon the premise that the Award of Board 282 is valid, as was determined in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al., supra*. No special boards had convened and none had made an award at that time. App. G, p. 18a.

The cause of action in this case is whether awards made by special boards in May, 1964, are valid and is based upon omissions by them occurring subsequent to the judgment in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al., supra*, and upon rulings by Arbitration Board 282 on October 10, 1965, sustaining those awards which appear at R. 46, 50, 54, 57-64, 66-71. It is not the same cause of action as was in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al., supra*. The majority of the Court below acknowl-

edged that the issue here was not an issue in that case (App. A, p. 3a, n. 5). The judgment entered February 28, 1964 in that case (R. 10) could not be *res judicata* of the issues in this action under a proper application of the doctrine of *res judicata*.

The following, from *Commissioner v. Sunnen*, 333 U. S. 591 (1948), at 597-598, is appropriate here:

> "It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. . . .
>
> "But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered' *Cromwell v. County of Sac, supra*, 353. And see *Russell v. Place*, 94 U. S. 606; *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48; *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. . . ."

The misconception and misapplication of *res judicata* by the majority of the Court below undercuts and would preclude giving effect to the earlier opinion and decision

of a different panel of judges of the same Court in the *Milwaukee case, supra,* upon the basis of which the court felt "constrained" to remand so the questions could be submitted to Board 282 (349 F. 2d at 210) and although, as noted in the dissent below, the question of *res judicata* was before the court at that time. App. B, p. 7a, n. 4.

If the decision of the majority of the Court below is allowed to stand the special boards which have purportedly changed collective bargaining contracts and the working conditions of trainmen and other railroad employees will thereby have become a law unto themselves and answerable to no authority, by authority of Arbitration Board 282, Public Law 88-108 to the contrary notwithstanding.

Underlying the foregoing questions is also the question whether petitioner and the railroad employees it represents will have been deprived of contract rights and will have had their working conditions changed without due process of law if the special board awards and the rulings by Arbitration Board 282 and the courts below are allowed to stand.

Petitioner has contended from the beginning that, to permit special board awards to stand, when the special boards which made them did not comply with Section 4 of Public Law 88-108 and Sections 7, 8 and 9 of the Railway Labor Act, would deprive petitioner and the railroad employees it represents of rights without due process of law. *Brotherhood of Railroad Trainmen v. Missouri Pacific Railroad Company, et al.,* 230 F. Supp. 197 (D. C. Mo. 1964), *supra.*

In the *Milwaukee case, supra,* the court below, in 1965, considered "meaningful review" of special board's awards, initially by Board 282 and, thereafter, by the courts under Section 4 of Public Law 88-108 and Section

9 of the Railway Labor Act necessary to "ensure" that the delegated authority of special boards was exercised within prescribed standards, obviously, those "standards" being the procedures prescribed by Public Law 88-108 and Sections 7, 8 and 9 of the Railway Labor Act for conducting the arbitration and the "guidelines" established by the award of Board 282. 345 F. 2d at 987, notes 4 and 5. The district court, in the same case, per Robinson, J., now Circuit Judge, recognized that special board awards must withstand the test of the Fifth Amendment. *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 237 F. Supp. at 418 (D. D. C. 1964).

Arbitration Board 282 does not consider "due process" to require a special board to observe the procedural requirements of the Railway Labor Act which Public Law 88-108 prescribed for the conduct of the arbitration (R. 70).

Notwithstanding the dissent of Circuit Judge Wright in the court below on due process grounds (App. B, p. 6a), the majority of the Court below did not then deal with the question. Instead, the majority declared "[w]e will not consider the merits" of petitioner's claims that special boards of adjustment, like Arbitration Board 282, were required to operate pursuant to the Railway Labor Act and take all evidence under oath and keep a transcript of their proceedings (App. A, p. 3a).

However, on July 27, 1967, in a further consideration of the *Milwaukee case, supra,* the same majority of the court below declared that "we have previously upheld [Arbitration Board 282's] determination that due process was not violated by lack of a transcript". Further, the majority said of its opinion in this case "we similarily affirmed the board's decision that a 'meaningful review' had been provided" (App. E, p. 14a).

The failure of an arbitration board to take evidence under oath or affirmation or to keep a record of its proceedings, including a transcript of the evidence, are, per se, grounds for impeachment of its award under Section 9 of the Railway Labor Act which was adopted by Public Law 88-108. It is equally apparent that, in the absence of a transcript, mandatorily required by Section 4 of Public Law 88-108 and Sections 7, 8 and 9 of the Railway Labor Act, it is not possible, upon review, to determine whether evidence was taken under oath or affirmation or whether a party was accorded a fair hearing or whether the award was warranted by the evidence under the "guidelines" established by Board 282 (R. 7-11). Circuit Judge Wright also noted that fact in his dissent in the July 27, 1967 decision of the *Milwaukee Case* (Appendix E, p. 16a). Board 282 recognized the necessity for a transcript for such a review but ruled that a party seeking review had the duty to provide the transcript notwithstanding the mandatory provisions of Public Law 88-108 and Section 7 Third (h) of the Railway Labor Act, placing such duty on the Board and notwithstanding Section 7 Third (g) of the Railway Labor Act and of the award by Board 282 which provide for the expense of making a transcript to be "shared equally by the parties" (R. 7). Board 282, like some of the courts below, now considers those provisions of the Railway Labor Act not to be applicable to special boards but only to Board 282. R. 63, 64, 70-71, *In Re Certain Carriers, etc.*, 231 F. Supp. 519 at 521 (D. D. C. 1964), 248 F. Supp. 1008 at 1012 (D. D. C. 1966), *supra*.

Now, the majority of the court below would foreclose resolution of the question on a belated and misconceived application of *res judicata*.

Circuit Judge Wright, in his dissent, regards the mandatory procedural provisions of Sections 7 and 8 of the Railway Labor Act for evidence to be taken under oath or

affirmation and for a transcript to be made by the arbitration board to be "due process safeguards" required by Congress when, by Public Law 88-108, it took the unprecedented action of substituting compulsory arbitration for the right to strike. Judge Wright noted that in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. Co., supra,* the court had approved Board 282's delegation of the arbitration required by Public Law 88-108 to special boards but said that "what this court did not approve was the delegation of the National Board's authority to the local boards without the due process safeguards required by the Act, i. e., Sections 7 and 8 of the Railway Labor Act." Continuing, Circuit Judge Wright said, "Appellees admit that the proceedings before the local boards in these cases have not been conducted pursuant to Sections 7 and 8 of the Railway Labor Act, and the union is here complaining of the local boards' failure so to proceed. Since Congress, in requiring the union to submit to compulsory arbitration, deemed the Sections 7 and 8 safeguards necessary for proceedings before the national Board, it is inconceivable to me that the national Board may legally delegate its authority to local boards without such safeguards" (App. B, p. 7a).

CONCLUSION.

Considering the unprecedented nature of the compulsory arbitration as a substitute for the right to strike; that the arbitration was not conducted by the board for which Congress provided, but by delegates of that board; the vascillating, conflicting and belated decisions of Arbitration Board 282 and of the courts below, the latest of which would, if sustained, foreclose a definitive determination of the validity of special board awards which purport to change contracts and affect the daily work of thousands of railroad employees, petitioner most sincerely and ear-

nestly urges this Court to resolve the questions as to the validity of special board awards and the Constitutional question.

Respectfully submitted,

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APPENDIX A.

Opinion Below.

Before Bastian, *Senior Circuit Judge*, Burger and Wright, *Circuit Judges*.

Burger, *Circuit Judge*: These appeals challenge the District Court's dismissal of objections filed by the Brotherhood of Railroad Trainmen (BRT) to Arbitration Board 282's answers of certain questions submitted to it by the BRT.

Little background need be set out since this case is merely the latest manifestation of a litigation syndrome that seems to keep the railroads and various governmental entities in the courts on an ancient issue.[1] It is sufficient here to note that, to head off a threatened national strike in 1963, Congress directed that unresolved issues be submitted to binding arbitration,[2] which was to be conducted pursuant to sections 7, 8, and 9 of the Railway Labor Act;[3] that Arbitration Board 282 made its Award later in that year; and that the portion of the Award here relevant delegated to local Special Boards of Adjustment resolution of disputes over the size and composition of train crews ("crew consist").

The appeal is directed at two questions. The first inquired of Arbitration Board 282 whether a carrier violated the terms of the Award by reducing its crews prior to

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[1] The dispute is chronicled in Bhd. of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. R. Co., 225 F. Supp. 11 (D. D. C.), *aff'd*, 118 U. S. App. D. C. 100, 331 F. 2d 1020, *cert. denied*, 377 U. S. 918 (1964), and in Bhd. of Railroad Trainmen v. Akron & Barberton Belt R. R. Co., No. 20,152, D. C. Cir., May 12, 1967.

[2] Joint Resolution, Public Law 88-108, 77 Stat. 132 (1963).

[3] 44 Stat. 582, 584, 585 (1926), as amended, 45 U. S. C., §§ 157, 158, 159 (1964).

disposition of the matter by the local Special Board. Board 282's Award had remanded the issue of "crew consist" to the local Special Boards with the requirement that "no change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, interpretation, or practice. . . ." The BRT complains that Board 282 answered its question by finding: "the Award bars changes in the scope or application of 'rules' in effect immediately prior to the effective date of this Award requiring a stipulated number of trainmen, whether such 'rules' were established by agreement, interpretation or practice. Where no such 'rule' was in effect immediately prior to the effective date of the Award, this bar does not apply." There is obviously no difference between the Award and the Board's interpretation of it; but Appellant also argues that the courts had interpreted the Award differently and that this construction was necessary to prevent the Award from failing to resolve the controversy and thus be contrary to the instruction of Congress.

In his opinion affirming the validity of Arbitration Board 282's Award, the District Judge summarized the Board's action by saying "what the Board did was to bar any changes for the time being. . . ."[4] Appellant

[4] Bhd. of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. R. Co., *supra* n. 1, 225 F. Supp. at 20. Appellant points also to similar statements by two other judges. In one, the opinion was expressly dealing with a change in a rule or in rule application, and statements that no change could be made were shorthand for "change in rule or in rule application." Chicago, Milwaukee, St. Paul & Pacific R. R. Co. v. Order of Ry. Conductors & Brakemen, 229 F. Supp. 178 (W. D. Wash. 1964). In the other, Judge Miller, sitting as a District Judge, stated that Judge Holtzoff had determined that no changes should be made in "crew consist" and noted that this had been directed only at the issue of the finality of Board 282's disposition; Judge Miller expressly left open the question of the meaning of the Award and directed that Board 282 first decide the question. Certain Carriers, etc. Misc. No. 40-63, D. D. C. Aug. 6, 1965.

claims this forbade any changes irrespective of whether a rule was in existence. This argument is at best disingenuous; read in context it is clear beyond doubt that the District Judge was merely summarizing the Award preparatory to meeting the challenge that it was not a final disposition of the issues and thus violative of the enabling statute. Whether the railroad could make changes if there were no rule or practice in effect was irrelevant to the issue. The District Court decided that the Award adequately disposed of the issues and was valid; his decision was not premised on any particular definition of or comment concerning the Award.

Appellant's second major contention is that the Special Boards of Adjustment, like Arbitration Board 282, were to operate pursuant to the Railway Labor Act; specifically, it urges that they were required to take all evidence under oath and to keep a transcript of their proceedings. Its argument is twofold. It claims first that the statute setting up compulsory arbitration subject to the Railway Labor Act established the same standard for the local Special Boards of Adjustment and secondly that the Arbitration Board erred in interpreting its Award by saying that it did not include this requirement. We need not consider the merits of these claims except to point out that the statutory argument is now precluded as being *res judicata* by virtue of the earlier review of the Award[5] and that our review of the Board's answer to

[5] In the action to impeach the Award, to which the BRT was a party, the unions claimed that the Award did not satisfy the requirements of Public Law 88-108; the District Court held that it did. Bhd. of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. C. Co., *supra* n. 1. The BRT's identical claim in this litigation, therefore, is determined by considerations of *res judicata*. The fact that it apparently did not urge this particular theory of illegality at the time of its impeachment action is, of course, irrelevant. A party may not litigate one issue and then, upon an unsuccessful disposition, revivify the same cause of action with a new theory. In any case, the BRT must have

the BRT's question with respect to what its Award required is determined by Section 9 of the Railway Labor Act and is therefore quite limited. It is sufficient to note that Appellant will not be heard to make these arguments at this late date.

The Special Boards of Adjustment were convened in the spring of 1964. Appellant refused to participate "on the ground that . . . final judgment of the court had not been entered in the proceeding which had been instituted to impeach the Award of Arbitration Board 282."[6] Although its motive is irrelevant, it is interesting to note that Appellant refused to participate in the proceedings even after the Award had been revised and the Supreme Court had denied it a writ of certiorari.

Having thus purposefully refused to participate, it now complains because the evidence was not taken under oath and transcripts not prepared by the Special Boards. Procedural objections to the action of an administrative agency or trial court must be timely made to give the tribunal an opportunity to correct the error, if error there be; such contentions cannot first be made on appeal.[7] It

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been aware at that time of the theory it now urges. It argued that Board 282 lacked authority to require the parties to bear the expenses of the neutral members on the local Special Boards since the parties had agreed to permit the government to bear the cost; yet it surely must have known that Section 7 Third (e) of the Railway Labor Act requires the government to pay. It was in a position, therefore, to realize that Board 282's Award did not call for the local Special Boards to act pursuant to the Railway Labor Act. There is no basis for the argument that the BRT could assume that the local Special Boards would be conducted in accordance with the Railway Labor Act and that the divergence from that Act was not in the Award but in the later actions of the Special Boards.

[6] It says that its refusal to participate was also based on the railroads' notices being more general than what was permitted by the Award; its record citations, however, do not support this.

[7] *E.g.*, United States v. Tucker Truck Lines, Inc., 344 U. S. 33, 37 (1952); Bower v. Eastern Airlines, Inc., 214 F. 2d 623, 627 (3d Cir.), *cert. denied*, 348 U. S. 871 (1954); United States

is imperative to an efficient and fair administration of justice that a litigant may not withhold his objections, await the outcome, and then complain that he was denied his rights if he does not approve the resulting decision.

But even more than that is involved here. Appellant is not lamenting merely about alleged procedural defects which it should have raised earlier; it is complaining about a lack of certain procedures which were *made irrelevant by its purposeful absence.* The Special Boards of Adjustments were limited, by Appellant's absence, to receiving documentary evidence submitted by the carriers. Since Appellant was not present to challenge the carriers, there was no occasion for a formal hearing in the usual sense; there was, therefore, no one to whom to give an oath and no testimony to transcribe. A party may not allege on appeal as error an action which he had induced the tribunal to take;[8] by boycotting the Special Boards of Adjustment, the Appellant did not merely induce the alleged errors but also made them necessary if the disputes were to be settled promptly.

Appellant's arguments that conditions caused by its refusal to participate require reversal of the awards is nothing more than another way of saying that it should

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v. Five Cases, 179 F. 2d 519, 523 (2d Cir.), *cert. denied*, 339 U. S. 963 (1960). Indeed in our earlier consideration of the question of the applicability of the Railway Labor Act to the Special Boards of Adjustment, when we suggested presenting the problem to Board 282, we noted, "Courts will not lightly view a party's failure to request certain procedural rights, or even refrain from participation only thereafter to await the outcome and then challenge an unfavorable result." Bhd. of R. R. Trainmen v. Certain Carriers, 121 U. S. App. D. C. 230, 232, 349 F. 2d 207, 209 n. 7 (1965).

[8] *E.g.*, Bowman v. Curt G. Joa, Inc., 361 F. 2d 706, 716 (4th Cir. 1966); Cranston Print Works Co. v. Public Service Co., 291 F. 2d 638, 649 (4th Cir. 1961); Livingston v. Shreveport-Texas League Baseball Corp., 128 F. Supp. 191, 203 (W. D. La. 1955), *aff'd*, 228 F. 2d 623 (5th Cir. 1956).

have complete veto power over the operation of these public Boards by the simple device of declining participation.

Affirmed.

Wright, *Circuit Judge,* dissents for the reasons stated in his dissenting opinion in Nos. 20212 and 20213, *Brotherhood of Railroad Trainmen* v. *St. Louis Southwestern Railway Company and Ralph T. Seward,* filed today.

APPENDIX B.

Dissenting Opinion Below.

Wright, *Circuit Judge, dissenting:* Public Law 88-108[1] provides for compulsory arbitration of two issues in the labor dispute between the railroads and the union: the use of firemen on locomotives, and the so-called crew consist issue. Thus, as to these issues, Congress took the unprecedented action of denying the union the right to strike. Conscious of the seriousness of its action, however, Congress provided adequate due process safeguards. It required that the proceedings before the compulsory arbitration Board "shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act." Public Law 88-108, § 4.

Proceeding pursuant to the mandatory provisions of Sections 7 and 8 of the Railway Labor Act,[2] the compulsory arbitration Board resolved the fireman issue. With reference to the crew consist issue, it decided that local arbitration boards would be created to resolve this issue on a local basis, the action of the local boards to be reviewed by the national Board.

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[1] 77 Stat. 132 (1963), 45 U. S. C., § 157 (1964).

[2] 45 U. S. C. §§ 157-158 (1964).

There is, of course, no provision in the Act for creation of local boards, but this action on the part of the national Board has been approved by this court.[3] What this court did not approve was the delegation of the national Board's authority to the local boards without the due process safeguards required by the Act, *i. e.*, Sections 7 and 8 of the Railway Labor Act.

Appellees admit that the proceedings before the local boards in these cases have not been conducted pursuant to Sections 7 and 8 of the Railway Labor Act, and the union is here complaining the local boards' failure so to proceed. Since Congress, in requiring the union to submit to compulsory arbitration, deemed the Sections 7 and 8 safeguards necessary for proceedings before the national Board, it is inconceivable to me that the national Board may legally delegate its authority to local boards without such safeguards.[4]

I respectfully dissent.

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[3] See *Brotherhood of Loc. Firemen & Enginemen v. Chicago, Burlington & Quincy R. Co.*, D. D. C., 225 F. Supp. 11, *affirmed*, 118 U. S. App. D. C. 100, 331 F. 2d 1020, *cert. denied*, 377 U. S. 918 (1964).

[4] The majority's ruling that this issue is precluded by *res judicata* because of our decision in *Brotherhood of Loc. Firemen & Enginemen v. Chicago, Burlington & Quincy R. Co., supra* Note 3, is difficult to understand. When this case was last before this court, *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, 121 U. S. App. D. C. 230, 349 F. 2d 207 (1965), the *res judicata* argument was thoroughly explored in the briefs of these same parties. This court at that time remanded the Sections 7 and 8 safeguards issue to the Board. 121 U. S. App. D. C. at 233, 349 F. 2d at 210. I cannot believe this court intended the Board and these parties to waste their time debating an issue the majority now decides has been closed to debate since 1964.

APPENDIX C.

Judgment Below.

Before: Bastian, Senior Circuit Judge, and Burger and Wright, Circuit Judges.

Judgment.

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the District Court appealed from in these cases is hereby affirmed.

Per Circuit Judge Burger.

Dated: May 19, 1967.

Circuit Judge Wright dissents for the reasons stated in his dissenting opinion filed today in Nos. 20,212 and 20,213, *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Railway Company and Ralph T. Seward.*

APPENDIX D.

Judicial Code.

28 USC 1254 (1), 62 Stat. 928.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Public Law 88-108.

"Sec. 2. There is hereby established an arbitration board to consist of seven members.

* * * * * * *

"Sec. 3. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth.

* * * * * * * *

"Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act.

* * * * * * * *

Railway Labor Act, Sec. 7.

(b) Organization of board; procedure.

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Duty to reconvene; questions considered.

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions re-

lating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

* * * * * * * *

(e) **Compensation and expenses.**

Each member of any board of arbitration created under the provisions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) **Award; disposition of original and copies.**

The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commis-

sion: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) Compensation of assistants to board of arbitration; expenses; quarters.

A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; compulsion of witnesses; fees.

All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration.

* * * * * * *

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

* * * * * * * *

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

* * * * * * * *

Award and judgment thereon; effect of chapter on individual employee—Filing of award.

First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Conclusiveness of award; judgment.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Impeachment of award; grounds.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption.

* * * * * * *

Effect of partial invalidity of award.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

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APPENDIX E.

United States Court of Appeals
for the District of Columbia Circuit.

No. 20,348.
No. 20,349.

Brotherhood of Railroad Trainmen,
Appellant,

v.

Chicago, Milwaukee, St. Paul and Pacific
Railroad Company (Lines East), et al.,
Appellees.

Appeal from the United States District Court
for the District of Columbia.

Decided July 27, 1967.

Before: Bastian, *Senior Circuit Judge*, and Burger and Wright, *Circuit Judges*.

Per Curiam: This is another "manisfestation of a litigation syndrome that seems to keep the railroads and various governmental entities in the courts on an ancient issue." *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, ... U. S. App. D. C. ..., ..., ... F. 2d ..., ... (Nos. 19,867, 20,003-04, decided May 19, 1967, slip op. p. 1). Issues raised in these appeals have been before this court previously in *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., ibid.*, and *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Railway Co., et al.*, ... U. S. App. D. C. ..., ... F. 2d ..., ... (Nos. 20,212-13, decided May 19, 1967). Our prior opinions are controlling and dispositive of

these issues and there is no need to supplement those opinions.

In addition, however, Appellant Brotherhood raises a new claim in these appeals. It now contends that the hearing before the Special Board of Adjustment did not afford it due process of law because of certain alleged procedural irregularities not heretofore considered.[1] Although these issues were exhaustively discussed and found to be without merit in Judge Robinson's original decision in the District Court, *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 237 F. Supp. 404, 418-25 (D. D. C. 1964), we remanded that case to Board 282 in order that it might pass upon these issues. *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 120 U. S. App. D. C. 295, 345 F. 2d 985 (1965). The Board concluded that the alleged procedural irregularities, considered singly or together, did not deprive the B. R. T. of the minimum essentials of a full and fair hearing.

We have previously upheld the Board determination that due process was not violated by lack of a transcript; we similarly affirmed the Board decision that a "meaningful review" had been provided. Although it would appear that the specific defects raised here are subsumed within the due process concept of "meaningful review" we did not discuss them in our prior opinions. We have now fully examined the claim newly raised on this appeal, and we find it to be without merit.

Affirmed.

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[1] Specifically the union claims that it was impossible to decide the job assignments in 60 days; that the hearing held in the company offices was inherently unfair and offered little time or space for interviews with witnesses; that there was a failure to allow a reasonable time to submit written exhibits; that the "referee" was not neutral; and that the "findings" were prepared by the company and submitted to the referee for approval.

Wright, *Circuit Judge, dissenting:* Public Law 88-108[1] provides that the compulsory arbitration required in this case "shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act." Pub. L. 88-108, § 4. As I have indicated in my dissents in *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Railway Co., et al.*, Nos. 20,212-3, and *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific RR Co., et al.*, Nos. 19,867, 20,003 and 20,004, decided May 19, 1967, the Compulsory Arbitration Board convened pursuant to Public Law 88-108 cannot avoid this statutory requirement by delegating portions of its authority to local boards.

In these cases appellant makes the additional point that the local board deprived it of the minimum essentials of a full and fair hearing in that, among other things, it was denied a reasonable opportunity to prepare its case, to call witnesses, and to conduct cross-examination. The company, of course, argues that the board hearing was full and fair. Since, in violation of Section 7 of the Railway Labor Act[2] and in spite of appellant's request, no transcript of the proceedings before the local board was provided, I am unable to resolve this due process issue on this record.

I respectfully dissent.

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[1] 77 Stat. 132 (1963), 45 U. S. C., § 157 (1964).

[2] 45 U. S. C., § 157 (1964).

APPENDIX F.

Excerpt From Pages 10 and 11 of Brief for Appellees in Brotherhood of Railroad Trainmen, Appellant, v. Certain Carriers Represented by the Eastern, Western & Southeastern Carriers Conference Committees, and Particularly the Missouri Pacific Railroad Company, Natchez & Southern Railway Company and the Texas & Pacific Railroad Company, Appellees, No. 18,844 in the United States Court of Appeals for the District of Columbia Circuit, 349 F. 2d 207 (1965).

"When the carriers, after January 25, 1964, commenced initial steps looking toward the putting into effect of provisions of the Award of Arbitration Board No. 282, numerous questions were raised with respect to the correct interpretation of various provisions of that Award. Both the carriers and the labor organizations, including the BRT, requested the Arbitration Board to reconvene to pass upon specified questions said to involve disputes by the parties as to meaning and application of the Award.

* * * * * * *

"Question No. 21, submitted by the BRT on May 21, 1964, reads:

"Is our understanding correct that special boards of adjustment established pursuant to the award of Arbitration Board 282, Section III, Part B, having no procedure stipulated by agreement, must therefore conduct their arbitration pursuant to Sections 7 and 8 of the Railway Labor Act, to the extent that said sections are not inconsistent with Public Law 88-108, and that the awards of those special boards are subject to Section 9 of the Railway Labor Act?"

The Board on September 16, 1964, declined to answer this question and referred the parties to the decision in this case to the court below."

APPENDIX G.

Pages 62-65 of the Joint Appendix in Brotherhood of Railroad Trainmen, et al., Appellants, v. The Akron & Barberton Belt Railroad Company, et al., Appellees, Number 20,152, in the United States Court of Appeals for the District of Columbia Circuit.

Stipulation as to Facts.

The undersigned parties hereby stipulate and agree, by and through counsel, for the purpose of this case as follows:

A. A number of awards have been made by special boards of adjustment constituted pursuant to Article III of the Award by Arbitration Board No. 282. Such special board awards include those listed below relating to plaintiffs in this proceeding:

Carrier	*Organization*	*Date*
Atchison, T. & S. F. R. Co. and Panhandle & S. F. R. Co.[1]	BRT	Sept. 10, 1965
Atchison, T. & S. F. R. Co.	BRT	Jan. 13, 1966
Atlantic Coast Line R. Co.	BRT	Nov. 24, 1964
Bangor & Aroostock Railroad Co.	BRT	May 29, 1964
Belt R. Co. of Chicago	BRT	July 21, 1964
Belt R. Co. of Chicago	BRT	Jan. 5, 1966
Boston & Maine Corporation	BRT	Oct. 1, 1964
Buffalo Creek Railroad Co.[2]	SUNA	June 23, 1965
Camas Prairie Railroad Co.	SUNA	Sept. 8, 1965
Chesapeake & Ohio R. Co.	BRT	Sept. 2, 1965
Chesapeake & Ohio R. Co.	BRT	Oct. 20, 1965

[1] The Panhandle & Santa Fe Railway Co. is now part of the Atchison, Topeka and Santa Fe Railway Co.

[2] The listing herein of the award, by a special board of adjustment with respect to the Buffalo Creek Railroad Co. and the SUNA is without prejudice to the position of either party in *Switchmen's Union of North America, et al. v. Buffalo Creek Railroad Co., et al.*, Civil Action No. 11,422, now pending in the United States District Court for the Western District of New York.

Carrier	*Organization*	*Date*
Chicago & Eastern Illinois R. Co.	BRT	Jan. 17, 1966
Chicago, M. St. P. & P. R. Co. (Award No. 1)	BRT	July 10, 1964
Chicago, M. St. P. & P. R. Co. (Award No. 2)	BRT	July 10, 1964
Chicago, M. St. P. & P. R. Co.	BRT	Aug. 28, 1964
Chicago, M. St. P. & P. R. Co.	BRT	Dec. 9, 1964
Chicago, M. St. P. & P. R. Co. and The Kansas City Southern R. Co. (Milwaukee-Kansas City Southern Joint Agency)	BRT	Dec. 30, 1964
Chicago & North Western R. Co.:		
CSTPM&O District—Award No. 1	BRT	Aug. 27, 1964
CSTPM&O District—Award No. 2	BRT	Aug. 27, 1964
L&M District—Award No. 1	BRT	Aug. 27, 1964
M&STL District—Award No. 1	BRT	Aug. 27, 1964
C&NW District—Award No. 1	BRT	Aug. 31, 1964
C&NW District—Award No. 2	BRT	Aug. 31, 1964
C&NW District—Award No. 3	BRT	Aug. 31, 1964
C&NW District—Award No. 4	BRT	Aug. 31, 1964
M. I. District—Award No. 1	BRT	Aug. 31, 1964
M&STL District—Award No. 1	SUNA	Aug. 27, 1964
Chicago, Rock Island & P. R. Co.	SUNA	Sept. 15, 1964
Chicago, Rock Island & P. R. Co.	SUNA	Nov. 20, 1965
Chicago & W.I.R. Co.	BRT	Dec. 12, 1964
Cincinnati Union Terminal Co.	BRT	Aug. 3, 1965
Clinchfield R. Co.	SUNA	Aug. 26, 1965
Colorado & Southern R. Co.	BRT	July 21, 1964
Davenport, R. I. & N. W. R. Co.	SUNA	Aug. 27, 1964
Ft. Worth & Denver R. Co.	BRT	May 20, 1964
Ft. Worth & Denver R. Co.	SUNA	May 27, 1964
Great Northern R. Co.	SUNA	Dec. 2, 1965

Carrier	*Organization*	*Date*
Green Bay & Western Railroad Co. and Kewanee, Green Bay & Western Railroad Co.	BRT	Jan. 25, 1966
Illinois Central R. Co.	BRT	Sept. 14, 1964
Illinois Central R. Co.	BRT	Nov. 30, 1964
Illinois Central R. Co.	BRT	Feb. 26, 1965
Illinois Central R. Co.	BRT	Oct. 26, 1965
Jacksonville Terminal Co.	BRT	Nov. 5, 1965
Kansas City Terminal R. Co.	SUNA	Dec. 21, 1964
Kansas City, Oklahoma & G. R. Co.	BRT	June 6, 1964
Kentucky & Indiana T. R. Co.	BRT	Aug. 17, 1964
Kentucky & Indiana T. R. Co.	BRT	Mar. 22, 1965
King Street Passenger Station	BRT	Jan. 4, 1965
Maine Central Railroad Co.	BRT	May 29, 1964
Midland Valley R. Co.	BRT	June 6, 1964
Minnesota, Dakota & Western R. Co.	BRT	Dec. 11, 1965
Missouri-Illinois R. Co.	BRT	Apr. 22, 1964
Missouri-Kansas-Texas R. Co.	BRT	May 14, 1964
Missouri Pacific R. Co. (Northern, Central and Southern Districts)	BRT	May 6, 1964
Missouri Pacific R. Co. (Gulf District)	BRT	May 6, 1964
Natchez & Southern R. Co.[3] Missouri Pacific Railroad Co.	BRT	May 6, 1964
New Orleans & L. C. R. Co.	BRT	May 14, 1964
New Orleans U. P. Terminal	BRT	May 23, 1964
Norfolk & Western R. Co.	BRT	Jan. 5, 1966
Norfolk & Western R. Co.	BRT	Jan. 7, 1966
Norfolk & Western R. Co.	BRT	Jan. 21, 1966

[3] The Natchez and Southern Railway Co. is now a part of the Missouri Pacific Railroad Co.

Carrier	*Organziation*	*Date*
Northern Pac. T. Co. of Oregon[4]	SUNA	July 15, 1965
Port Terminal R. Ass'n	BRT	May 14, 1964
Reading Company (Case No. 1)	BRT	Nov. 19, 1965
Reading Company (Case No. 2)	BRT	Nov. 19, 1965
Richmond, F. & P. R. Co.	BRT	Jan. 20, 1966
St. Louis Southwestern R. Co.	BRT	July 14, 1964
St. Louis & S. F. R. Co.	BRT	June 6, 1964
St. Paul Union Depot Co.	SUNA	Nov. 1, 1965
St. Paul Union Depot Co.	SUNA	Jan. 24, 1966
Southern Pacific Co.	BRT	June 4, 1964
Southern Pacific Co.	SUNA	Sept. 8, 1964
Southern Pacific Co.	SUNA	June 17, 1965
Southern Pacific Co.	SUNA	Nov. 22, 1965
Spokane, P. & S. R. Co.	BRT	Nov. 15, 1965
Terminal R. Ass'n of St. L.	BRT	Oct. 16, 1964
Texas & Pacific R. Co.[5]	BRT	May 6, 1964
Texas Pacific-Missouri Pacific Term. R. Co. of N. O.	SUNA	May 16, 1964
Union Railway Co.	BRT	May 14, 1964
Union Term. & St. J. Belt R. Cos.	BRT	May 15, 1964
Wabash Railroad Co.[6]	BRT	Undated
Washington Terminal Co.	BRT	Oct. 15, 1964
Washington Terminal Co.	BRT	Nov. 26, 1965

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[4] The Northern Pacific Terminal Company of Oregon now is the Portland Terminal Railroad Company.

[5] The special board award also applies to subsidiaries of the Texas & Pacific Railway Company—Abilene & Southern Railway, Fort Worth Belt Railway Co., Texas-New Mexico Railway Co. and the Weatherford, Mineral Wells & North Western Railway Co.

[6] The Wabash Railroad Co. is now a part of the Norfolk and Western Railway Co.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 500

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, ET AL.,
*Respondents.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MISSOURI PACIFIC RAILROAD COMPANY, NATCHEZ & SOUTHERN RAILWAY COMPANY and THE TEXAS & PACIFIC RAILWAY COMPANY.*

Opinions Below

The opinion of the Court of Appeals (App. A of Petition), not yet officially reported, is unofficially reported at

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* For reasons best known to itself, petitioner has included as respondents in the caption of its petition "Certain Carriers Represented by the Eastern, Western & Southeastern Carriers' Conference Committee" in addition to the named individual railroads on whose behalf this brief is filed, Ralph T. Seward and the United States. The only railroads named as respondents in the court below (other than the railroad involved in that aspect of the case which is the subject of the petition in No. 501) are the individual railroads named as respondents here. In order to avoid confusion, however, we have adopted the caption utilized by petitioner. We note, also, that the Natchez & Southern Railway Company has been merged into the Missouri Pacific Railroad Company.

55 CCH Labor Cases §11,931. The opinion of the District Court (JA 150-159) is reported at 248 F. Supp. 1008.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether the ruling by Arbitration Board No. 282 in answer to BRT Question No. 36 that its Award does not require special boards of adjustment created pursuant to the Award to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act constitutes a permissible interpretation of the language of the Award?

2. If the answer to the above question is in the affirmative, whether a judgment in a prior proceeding between the same parties, among others, upholding the validity of the Award is *res judicata* and bars any attack in this proceeding upon the validity of the Award as so interpreted?

3. Whether petitioner, which refused to participate in the proceedings of the special boards of adjustment involved in BRT Question No. 36 and which did not object to the procedures followed by those special boards, thereby waived any objections it may have had to those procedures and is estopped from raising such objections on appeal?

Statement of the Case

In November of 1959, most of the nation's Class I railroads served five unions (including petitioner) with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of proposed changes in a number of obsolete rules which were causing serious overmanning of trains. One of the proposals thus made was to abolish all rules requiring the use of trainmen (such as brakemen and helpers) in road and yard service, and to permit management to determine

the number of such trainmen to be used in its discretion. In September of 1960, the unions served the railroads (including these respondents) with Section 6 notices of various counterproposals, including a proposal by petitioner to establish a rule requiring the use of at least two trainmen on all crews in road and yard service. The parties exhausted the "major" dispute procedures of the Railway Labor Act (45 U.S.C. §§ 151-160) without settling this dispute, and thus were in a position to resort to self help including strikes by the unions. See *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

To prevent such a disaster, Congress enacted P.L. 88-108 (77 Stat. 132). That statute committed the crew-consist issue raised by those aspects of the Section 6 notices referred to above and another issue involving the use of locomotive firemen to final and binding arbitration by an arbitration board commonly known as Arbitration Board No. 282. Section III of the Award (JA 5-10) by Arbitration Board No. 282 related to the crew-consist issue, and is set forth in Appendix A hereto. It provided, among other things, that no change could be made in rules requiring a stipulated number of trainmen to be used in road and yard service except by agreement or pursuant to the procedures established by the Award. In general, those procedures permitted either a carrier or a union to serve the other with written notice of proposed changes in rules requiring a stipulated number of trainmen, provided that they should confer and attempt to reach agreement upon such proposals in the light of "guidelines" or standards specified in the Award, and provided that, if no agreement was reached, the dispute could be submitted by either party to a special board of adjustment (composed of one representative of the carrier, one representative of the union and a neutral member) for final decision, pursuant to those guidelines.

Petitioner and three other unions filed petitions to impeach the Award, pursuant to Section 9 of the Railway Labor Act (45 U.S.C. § 159) as incorporated by Section 4 of P.L. 88-108, contending that the Award did not comply with P.L. 88-108 and was otherwise invalid. The validity of the Award was upheld, however, in a decision that has become final. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

The crew-consist provisions of the Award became effective of January 25, 1964, and these respondents served petitioner on that date with notices pursuant to the Award of proposed changes in their rules requiring a stipulated number of trainmen on crews in road and yard service. Petitioner refused to confer or negotiate in an attempt to reach an agreement upon those proposals, so these respondents invoked the special-board procedures established by the Award and four special boards of adjustment were established to determine the disputes over the four notices which were served. After raising certain jurisdictional objections—all of which have since been abandoned and none of which are involved here—petitioner refused to participate any further in the proceedings of the special boards. Thus, petitioner did not, before any of the special boards, object to the procedures which they followed or request that they follow the procedures specified in Sections 7 and 8 of the Railway Labor Act (45 U.S.C. § 157, 158). See JA 15-21.

The special boards issued their awards on May 6, 1967 (JA 72-103), upon the basis of documentary evidence submitted by these respondents (JA 17-19), who notified petitioner that the awards would be put into effect on May 11, 1964. On that same day, petitioner filed a complaint in

the United States District Court for the Eastern District of Missouri and obtained a temporary restraining order preventing effectuation of the awards. After a hearing, however, that court dismissed the complaint on jurisdictional grounds and dissolved the restraining order. *Brotherhood of Railroad Trainmen* v. *Missouri Pacific R. Co.*, 230 F. Supp. 197 (E.D. Mo., 1964). Petitioner then filed in the United States District Court for the District of Columbia a motion for supplemental relief under the judgment upon the Award by Arbitration Board No. 282, requesting that the special board awards be set aside as void for several reasons including a contention that the special boards were subject to the requirements of Sections 7 and 8 of the Railway Labor Act. *In re Certain Carriers, Etc.*, 231 F. Supp. 519 (D. D.C., 1964). In denying that motion upon its merits, that court held that Sections 7 and 8 "are not applicable to the special boards of adjustment" created under the Award (*id.*, at 521), and noted "that it is questionable whether the plaintiff is in a position to challenge the procedure of the [special boards], for it declined to participate in the hearing" (*id.*, at 521).

Upon appeal from that decision, the Court of Appeals for the District of Columbia Circuit held that Arbitration Board No. 282 had primary jurisdiction to determine whether its Award required the special boards of adjustment to follow the procedures specified in Sections 7 and 8 of the the Railway Labor Act, and remanded the case with directions for entry of an order permitting that issue (and another which is not involved here) to be submitted to Board 282. *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.*, 349 F.2d 207 (D.C. Cir., 1965). In so doing, the Court of Appeals also noted that petitioner's refusal to participate in the proceedings of the special boards and its failure to request those boards to follow

the procedures specified in Sections 7 and 8 cast doubt upon petitioner's right to raise that issue (*id.*, 209-210), and stated that "Board 282 could also consider what significance to attach to [petitioner's] failure to raise the issue before the Special Board" (*id.*, at 210, fn. 11).

Petitioner then submitted BRT Question No. 36 (JA 66-71) to Board 282. This was a lengthy multi-part question which raised a number of issues as to the interpretation of Award 282, most of which are not involved here. The issue as to whether the Award required the special boards of adjustment to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act was raised by Parts (B) and (C) of BRT Question No. 36, to which Board 282 answered, on October 10, 1965, (JA 70) that:

> "The special boards of adjustment provided for in Section III, Part B, of Award 282 are not required by the terms of the Award to adhere to procedures prescribed in either Section 7 or Section 8 of the Railway Labor Act."

This answer was accompanied by a Preliminary Statement (JA 54-64), which is reproduced in Appendix B hereto.[1] Among other things, the Board noted that several of the provisions of the Award were inconsistent with the requirements of Sections 7 and 8 of the Railway Labor Act (App. B, at 29-30), and stated that "it was never our intention that the special boards of adjustment for which we provided would be subject to Sections 7 and 8 of the Railway Labor Act" (App. B, at 31). The Board's detailed explanation of why that was so is set forth in App. B, at 28-31. In addition, the Board stated (App. B, at 33) that:

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[1] The Preliminary Statement also related in part to BRT Questions No. 32 and 33.

"A party which refuses to participate in the proceedings before the special board and files its formal objection only after decision has been rendered is, in the absence of extenuating circumstances, properly estopped from protesting that its procedural rights have been violated."

And, while a party desiring a transcript of the proceedings before a special board "is entitled to have it," with "that right comes the obligation to pay the cost" (App. B, at 33).

A petition (JA 46-53) to impeach these and certain other rulings by Board 282 was filed by petitioner, pursuant to Section 9 of the Railway Labor Act as incorporated by Section 4 of P.L. 88-108, in the United States District Court for the District of Columbia, and was denied by that Court (JA 159-160). In its opinion, the District Court concluded "that the decisions of Board 282 involved in this proceeding, were entirely valid and proper and should be sustained" (JA 159), and stated, among other things, that (JA 158-159):

"The principal attack on the decisions of the special boards of adjustment, is that the proceedings conducted by these tribunals were informal and that no stenographic record was made of the testimony. The United States was, without objection, permitted to intervene in the present action. Counsel for the Government at the oral argument informed the Court that practically all of these boards proceeded in the same manner and that no stenographic records were kept by most if not all of them. He called attention to the fact that at this late date if this mode of procedure were held to be in violation of law, it would be necessary to set aside and vacate all of the rulings of the

special boards and to require them to conduct new hearings. The result would be delay and expense with possible detriment to both sides of the controversy. It does not appear that the Brotherhoods either requested the boards to proceed in any other manner, or that they moved that a stenographic record be kept of the testimony. It is not unlikely that if such a request had been made at the beginning, it might well have been complied with. It is not appropriate for them to raise the objection at this late date after remaining silent while the special boards were in operation."

The Court of Appeals affirmed the dismissal of the impeachment petition. In so doing, that Court held, among other things, that petitioner's "statutory argument is now precluded as being *res judicata* by virtue of the earlier review of the Award" (Pet., App. A, at 3a), that petitioner's "contentions cannot first be made on appeal" and thus are barred by its refusal to participate in the special board proceedings and its failure to object to the procedures followed by the special boards (*id.*, at 4a-5a), and that (*id.*, at 5a) "even more than that is involved here" since:

"The Special Boards of Adjustment were limited, by Appellant's absence, to receiving documentary evidence submitted by the carriers. Since Appellant was not present to challenge the carriers, there was no occasion for a formal hearing in the usual sense; there was, therefore, no one to whom to give an oath and no testimony to transcribe. A party may not allege on appeal as error an action which he had induced the tribunal to take; by boycotting the Special Boards of Adjustment, the Appellant did not merely induce the

alleged errors but also made them necessary if the disputes were to be settled promptly."

Section 4 of P.L. 88-108 provided, among other things, that the Award by Arbitration Board 282 "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Board 282 provided in its Award for a two year period which expired, insofar as the crew-consist provisions of the Award are concerned, on January 25, 1966. In another proceeding, the District Court has held that the modifications in the carriers' prior crew-consist rules made by agreements and special board awards pursuant to the procedures established by Award 282 continue to apply after January 25, 1966 (until changed in accordance with the Railway Labor Act), but that the procedures established by the Award cannot be invoked after January 25, 1966. *Akron & Barberton Belt R. Co.* v. *Brotherhood of R. Trainmen*, 250 F. Supp. 691 (D. D.C., 1966), supplemental opinion, 252 F. Supp. 207 (D. D.C., 1966). Those rulings have been affirmed by the Court of Appeals. *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, — F. 2d —, 55 CCH Labor Cases ¶ 11,912 (D.C. Cir., May 12, 1967), supplemental opinion, — F. 2d —, 56 CCH Labor Cases ¶ 12,095 (D.C. Cir., July 31, 1967). If those rulings become final, these respondents would not be able to have their proposed changes in crew-consist rules determined under the procedures established by the Award should the special board awards involved here be declared to be invalid.

Argument

The court below noted that "this case is merely the latest manifestation of a litigation syndrome that seems to keep the railroads and various governmental entities in the court on an ancient issue" (Pet., App. A, at 1a). The symptoms of petitioner's "litigation syndrome" apparently have become even more manifest. Petitioner has filed two petitions for writ of certiorari from the judgment in the proceeding below—this petition and No. 501. Both of the petitions appear to us to be without substance, as we demonstrate herein with respect to the instant petition.

Petitioner, in the statement of its Reasons for Granting the Writ, attacks only the holding below that it is precluded by principles of *res judicata* from attacking the validity of Award 282 in this proceeding. Petitioner does not contend here that the ruling by Board 282 in answer to BRT Questions No. 36(B) and (C) is not a reasonable interpretation of the language of Award 282. Petitioner does not question here the merits of the four special board awards which are involved. And, most importantly for present purposes, petitioner does not contend here that the court below erred in its holding that petitioner is precluded, by its failure to participate in the proceedings of the special boards of adjustment or to object to the procedures followed by those special boards, from questioning the validity of those procedures on appeal.

As might be expected from petitioner's failure to contend to the contrary in its petition, this alternative basis for the judgment below is undoubtedly correct. As this Court stated in *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952), "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the

courts." This salutary principle is applicable to proceedings of arbitration boards. *Bower* v. *Eastern Airlines*, 214 F. 2d 623, 627 (3d Cir., 1954); *Chicago, R. I. & P. Ry. Co.* v. *Union Pac. R. Co.*, 254 Fed. 235, 238 (8th Cir., 1918). We are not aware of any decisions to the contrary and, obviously, none have been cited by petitioner. Moreover, the reasons for applying this principle here are even greater than normally is true in view of the decision below, in another case, that the procedures established by the Award no longer can be invoked so as to permit new awards to be obtained if the present awards should be set aside. See p. 9, *supra*. Since the judgment below is adequately supported on this basis alone and should not be reversed even if the Court of Appeals erred in its application of the principles of *res judicata*, this is not a case which should occupy the time of this Court, even if the *res judicata* issue otherwise might be worthy of review.

In fact, however, the *res judicata* issue is not worthy of review by this Court, even if it had constituted the sole basis for the judgment below. We believe that the decision below with respect to that issue is clearly correct, but at most all that is involved is the application of established legal principles to the facts of this particular case. The only other decisions applying those principles to the same essential facts (both of which were by the court below and one of which is now here on petition for writ of certiorari in No. 499) reached the same result. Hence, there is no conflict of decisions and no issue of general importance sufficient to justify a grant of the petition under the standards established in Rule 19 of this Court.

Petitioner's contention that Award 282 is invalid because it did not require the special boards of adjustment to follow the procedures specified in Sections 7 and 8 of the Railway

Labor Act is grounded upon the provision in Section 4 of P.L. 88-108 that:

> "To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act."

It seems apparent from the face of this provision that it applies to the arbitration by the "arbitration board to consist of seven members" established by Section 2 of P.L. 88-108; *i.e.*, to the proceedings of Arbitration Board No. 282, which have been conducted in accordance with Sections 7 and 8 insofar as those sections are not inconsistent with P.L. 88-108. Board 282 so stated in its Preliminary Statement (App. B., at 30), and the District Court so concluded (JA 156).

But however that may be, it is entirely plain from the language of Award 282 that it did not require the special boards of adjustment to conform with the provisions of Sections 7 and 8 of the Railway Labor Act. In addition to omitting any language which might be interpreted as requiring the special boards to follow the procedures specified in those statutory provisions, the Award contains several provisions which which plainly are inconsistent with any such requirement, as Board 282 noted (App. B, at 29-30). The Award limits the special boards to three members (App. A, at 20); Section 7 First of the Railway Labor Act permits the parties to agree upon either three or six members. The Award allows the partisan members ten days after the selection of the second partisan member in which to select the neutral member (App. A, at 20); Section 7 Second of the Railway Labor Act allows the partisan members five or fifteen days after their first meet-

ing in which to select the neutral member or members. The Award provides that the fees and expenses of the neutral member and other incidental expenses shall be shared equally by the parties (App. A, at 21); Section 7 Third (e) of the Railway Labor Act provides for payment by the National Mediation Board of such fees and expenses. And, of course, Section 7 First of the Act requires an agreement to arbitrate the terms of which are specified in elaborate detail in Section 8 of the Act, while Section III-B(1) of the Award (App. A, at 20) permits "either party" to refer a dispute to a special board of adjustment without requiring an agreement of any kind.

In short, there never has been any basis for substantial doubt about the fact that the Award did not subject the special boards to the requirements of Section 7 and 8, as is indicated by the fact (see p. 7, *supra*) that practically all of the special boards disregarded Sections 7 and 8, and not just the four boards involved in BRT Question No. 36. Consequently, the contention that the Award is invalid because it did not require the special boards to conform to the procedures specified in Sections 7 and 8 of the Railway Labor Act was available to petitioner from the outset.

Under Section 9 Second of the Railway Labor Act, as incorporated by Section 4 of P.L. 88-108, issues as to the validity of the Award had to be raised in an impeachment petition filed within 10 days after the Award was filed with the district court.[2] As noted in our Statement of the Case (p. 4, *supra*), petitioner did file a petition to impeach the validity of the Award, contending that it did not comply

[2] "An Award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties." 45 U.S.C. § 159 Second.

with the requirements of P.L. 88-108. One of the specific contentions made in that regard was "that the arbitration board lacked authority to require the parties to bear the expenses of neutral members of the local adjustment boards." 225 F. Supp., at 21. While petitioner did not base that contention upon an argument that Sections 7 and 8 of the Railway Labor Act applied to the special boards, such an argument could have been made if thought to have any merit since Section 7 Third (e) provides that arbitrators named thereunder "shall receive from the [National] Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator."

Consequently, we submit that the court below undoubtedly was correct in its explanation of its *res judicata* holding (Pet., App. A, at 3a-4a, fn. 5), as follows:

> "In the action to impeach the Award, to which the BRT was a party, the unions claimed that the Award did not satisfy the requirements of Public Law 88-108; the District Court held that it did .... The BRT's identical claim in this litigation, therefore, is determined by considerations of *res judicata*. The fact that it apparently did not urge this particular theory of illegality at the time of its impeachment action is, of course, irrelevant. A party may not litigate one issue and then, upon an unsuccessful disposition, revivify the same cause of action with a new theory. In any case, the BRT must have been aware at that time of the theory it now urges. It argued that Board 282 lacked authority to require the parties to bear the expenses of the neutral members on the local Special Boards since the parties had agreed to permit the government to bear the cost; yet it surely must have known that

Section 7 Third (e) of the Railway Labor Act requires the government to pay. It was in a position, therefore, to realize that Board 282's Award did not call for the local Special Boards to act pursuant to the Railway Labor Act. There is no basis for the argument that the BRT could assume that the local Special Boards would be conducted in accordance with the Railway Labor Act and that the divergence from that Act was not in the Award but in the later actions of the Special Boards."

Petitioner contends (Pet., at 15-16) that the court below misapplied the *res judicata* doctrine established in such cases as *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948), because it erred in concluding that petitioner was asserting the same cause of action as that which it asserted in its petition to impeach the validity of the Award. But it is petitioner, not the court below, which has erred in this regard. Petitioner is now contending in effect that the answer to BRT Question No. 36 is invalid because the Award itself is invalid, rather than because that answer did not reasonably interpret the language of the Award.[3] That is the same cause of action as was asserted in the petition to impeach the Award and, as this Court held in the *Sunnen* case relied upon by petitioner, the judg-

[3] Issues as to whether a ruling by an arbitration board as to the meaning or application of its award, pursuant to Sections 7 Third (e) and 8(m) of the Railway Labor Act, constitutes a reasonable interpretation of the language of its award can, of course, be raised in a petition to impeach such a ruling under Section 9 of the Act. *Order of Railroad Telegraphers* v. *New York Central R. Co.*, 181 F. 2d 113 (2d Cir., 1950); *Mid-Continent Airlines* v. *Brotherhood of Railway, Etc.*, 83 F. Supp. 976 (W.D. Mo., 1949). This was recognized by the court below in that aspect of its opinion (Pet., App. A, at 1a-3a) which is the subject of the petition in No. 501, in rejecting a contention by petitioner that the ruling by Board 282 in answer to BRT Question No. 33 did not properly interpret the language of Award 282.

ment in the original action "puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever" because "the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." 333 U.S., at 597.

In any event, as the above quotation from the opinion of the court below demonstrates, that court recognized that the same cause of action must be involved in order to preclude a party from raising in the second proceeding an issue which it could have, but did not, raise in the first proceeding. As the court below stated, a "party may not litigate one issue and then, upon an unsuccessful disposition, revivify the same cause of action with a new theory." Hence, even if there were basis for doubt about the conclusion that the same cause of action is involved in this proceeding as in the earlier impeachment proceeding, all that is involved is the application of established principles to the facts of the particular case. As we understand, this Court normally does not exercise its discretionary certiorari jurisdiction to review such issues. See Stern & Gressman, *Supreme Court Practice* (3d ed., 1962), at 140-141, 146-148.

At the very commencement of petitioner's efforts to invalidate the four special board awards involved here, in the proceeding brought in the Eastern District of Missouri (see p. 5, *supra*), that Court stated that "any issue involving the validity of Award 282 . . . is not an open one because the only forum with authority to determine that issue has determined it adversely to" petitioner in the initial impeachment proceeding. *Brotherhood of Railroad Trainmen* v. *Missouri Pac. R. Co.*, 230 F. Supp. 197, 201

(1964). In addition to the decision before the Court in this petition, the court below similarly applied the *res judicata* doctrine in refusing to impeach rulings by Board 282 with respect to two other special board awards—in the case now before this Court on petition for writ of certiorari in No. 499 and in the case decided by the opinion attached to the petition herein as Appendix E.

There are no decisions to the contrary.[4] Furthermore, there is no prospect that the issue will arise in any other cases, at least if the decision below in another proceeding that the procedures established by the Award no longer can be invoked becomes final, since neither petitioner nor any other union sought to impeach any rulings by Board 282 concerning the validity of special board awards apart from the rulings involved in the cases which have been referred to. Under Section 9 of the Railway Labor Act, as incorporated by Section 4 of P.L. 88-108, a petition to impeach those rulings had to be filed within 10 days after they were filed with the District Court, which time has long since expired. And, after acquiescing in and complying with the non-contested special board awards for periods of more than 19 months (see Pet., App. G, at 18a-21a), petitioner would be barred by laches from requesting Board 282 now to rule that such awards do not comply with its

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[4] Contrary to petitioner's contention (Pet., at 12), the earlier decision by the court below, in *Brotherhood of Railroad Train.* v. *Chicago, M., St. P. & P. R. Co.*, 345 F.2d 985 (D.C. Cir., 1965), is not to the contrary. That case held that Board 282, rather than the courts, had primary jurisdiction to determine whether an award by a special board of adjustment complied with its Award. After the special board award there involved was upheld by Board 282, and petitioner sought to impeach that ruling by contending that the Award as so interpreted was invalid, the court below held such a contention to be precluded by the *res judicata* doctrine, in the opinion attached to the petition herein as Appendix E (p. 14a). (That case also involved certain issues not involved here which were disposed of on other grounds (p. 15a).)

Award. Consequently, this case does not involve an issue of general importance so as to justify a possible grant of certiorari despite the absence of any conflict of decisions.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

III. Consist of Road and Yard Crews (Other Than Engine Service)

Part A—Basic Provisions

A(1). The issue of crew consist (other than engine service) shall be remanded to the local properties for negotiation. Pending the consummation of local agreements disposing of the issue, the following provisions shall govern the use of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) employed in all classes of road service, including all miscellaneous and unclassified services, and the use of brakemen or helpers employed in all classes of yard, transfer, and belt line service, including all miscellaneous yard services.

A(2). No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, interpretation, or practice, which require a stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) in any class of road service, including all miscellaneous and unclassified services, or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service, including all miscellaneous yard services, except by agreement, or pursuant to the provisions of this Award.

A(3). Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) used in any class of road service, including all miscellaneous and unclassified services, in the following categories:

(a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and

(b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen;

and of any proposed change in any such stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service. The parties in interest, as that term is used in this Award, shall include only the carrier and the organization representing the class or craft of employees holding seniority rights to the position or positions proposed to be abolished or created in the seniority district or districts in which such changes are proposed. The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice.

PART B—REVIEW PROCEDURES

B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment.

B(2). Such special board of adjustment shall be chosen in the following manner:

(a) Each party in interest shall name one member within 10 days after notice has been given that the dispute will be referred to such special board of adjustment; and the two partisan members so chosen, within 10 days after the date of the selection of the second partisan member, shall name the neutral member, who shall be chairman of the board. If the members chosen by the parties shall fail to name the neutral member of the board within 10 days, the National Mediation Board shall be requested to name such member within 5 days after the receipt of such request.

(b) If either party fails to name a member of the board within the 10 days provided in paragraph B(2)(a) of this Award, the National Mediation Board shall be requested to name such member in lieu of such

party and shall also name the neutral member necessary to constitute a board of 3 members, all within 5 days after the receipt of such request.

B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement.

PART C—GUIDELINES

C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

C(2). General considerations.

(a) Assurance of adequate safety.
(b) Avoidance of unreasonable burden or workload on members of the crew.
(c) Changes in operating conditions, including density of traffic.
(d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.
(e) Special conditions which exist on any particular assignment.
(f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.
(g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).
(h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.

(i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.
(j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).
(k) The presence or absence of a fireman in the engine service crew.

C(3). Particular considerations—passenger road service.

(a) The amount of baggage and storage mail to be handled on and off the train at intermediate stations by the train crew.
(b) The number of passenger cars handled in the train and passenger count.
(c) The method of handling passenger transportation (tickets).
(d) The number of passengers boarding and leaving the train at intermediate stations.
(e) Duties required other than the above on any particular assignment.

C(4). Particular considerations—freight service, including miscellaneous and unclassified services.

(a) The amount and nature of work to be performed en route.
(b) The length of train, in context with the amount and nature of work to be performed en route.
(c) Time limitations applicable to the particular assignment.

C(5). Particular considerations—yard, transfer, and belt line service, including all miscellaneous yard services.

(a) The amount and nature of the work to be performed.
(b) Volume of work considered in context with applicable service time limitations.

Part D—Employee Protection

D(1). Road trainmen and yard brakemen or helpers, other than those on furlough on the date that this Award becomes effective, shall be known and designated, for the purposes of this Award, as "protected employees."

D(2). A "protected employee," known and designated as provided in paragraph D(1) of this Award, shall retain his rights to and obligations to protect road and yard service assignments (including all assignments in miscellaneous and unclassified road services and all assignments in transfer, belt line, and miscellaneous yard services) for which he is qualified, as provided by rules in effect on the day preceding the day this Award becomes effective, to the extent that such positions are available to him in his seniority district, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of road trainmen and yard brakemen or helpers by natural attrition; provided, that no such "protected employee" shall have any right to jobs or positions that the carrier may discontinue pursuant to the provisions of this Award if other employment in any such classes of service, for which such employee is qualified, is available to him in his seniority district. If and when the carrier is required to create new jobs or positions for road trainmen or yard brakemen or helpers, pursuant to the provisions of this Award, such positions shall first be filled, to the extent available, by "protected employees" then filling positions which the carriers would otherwise have the right to abolish or eliminate pursuant to the provisions of this Award, before such jobs or positions may be claimed by other employees of the carrier in accordance with their seniority rights.

APPENDIX B

Preliminary Statement

BRT Questions 32, 33, and 36 raise issues of considerable importance, the implications of which extend beyond the bounds of the matters directly involved. These issues are not new; we have previously considered all of them and have dealt with them, directly or by implication, either in our initial Award and Opinion or in subsequent interpretations. They are important, nevertheless, primarily because of the circumstances leading up to their submission to this Board.

BRT Question 32 grew out of a dispute between the Brotherhood and Chicago, Milwaukee, St. Paul & Pacific Railroad Company. The Carrier having sought reduction in the size of train crews on a large number of assignments, two special boards (each with the same personnel) were established and subsequently rendered awards, dated July 10, 1964, now challenged by the Brotherhood. Initially, the Brotherhood brought suit in the United States District Court for the District of Columbia against the Carrier and the members of the special boards for a declaration that the awards are void, and for an injunction to restrain the Carrier from putting them into effect. The prayer for relief was based on allegations that the Carrier's notices of proposed reductions in yard and baggagemen crews included such a large number of different job assignments as to violate the terms and intent of Award 282; that the Carrier refused to negotiate in the manner contemplated by Award 282, with the result that arbitration was prematurely and improperly invoked; that the special boards lacked jurisdiction over the issue involving baggagemen; that the special boards denied the Brotherhood a full and fair hearing, thereby violating its right to due process guaranteed by the Fifth Amendment; and that the awards of the special boards are void because they were not based on the guidelines established by Award 282. On October 23, 1964, District Judge Robinson, after thoroughly reviewing all these allegations, denied the requested relief, and

the Brotherhood appealed. By stipulation the record in the proceeding before Judge Robinson has been received in evidence and made a part of the record before this Board in the proceeding involving B.R.T. Question No. 32.

On April 15, 1965, the Court of Appeals for the District of Columbia, in an opinion by Chief Judge Bazelon, ruled that "Board 282 is best able to decide" the questions raised by the BRT. Accordingly, it remanded the case to the district court with instructions to dismiss the complaint without prejudice to the right of either party to make further application to Board 282. BRT Question 32, filed with us on June 11, 1965, presents to this Board the same issues previously considered and disposed of by Judge Robinson.

On September 28, 1965, the Brotherhood submitted a supplemental filing in respect to Question 32. This document recites that on September 21, 1965, the Milwaukee Railroad served a second notice covering crew consists on its Lines East covering all jobs assignments not included in the notice which initiated the disputed proceedings discussed above. The BRT charges that the Carrier is "clearly seeking a blanket rule to apply on all its yard assignments, whereas it led the first Special Board to believe that the reduction in crew would be justified only on the 162 out of 312 job assignments."

The BRT asks us to expand our answer to Question 32 to cover the situation created by the second notice filed by the Carrier. This we decline to do. The proceeding involving the Carrier's first notice has been completed, and the special board's award is before us for review. In contrast, no proceedings involving the Carrier's second notice have even begun, and no specific questions arising out of that notice which involve the interpretation or application of Award 282 have been submitted to us. We believe, however, that the views expressed below on issues previously raised in connection with BRT Questions 32, 33 and 36 will be helpful to the Brotherhood in its determination of the position it wishes to take in respect to the second notice.

BRT Question 33 also arose out of a dispute with the

Milwaukee Railroad. On June 23, 1965, the Brotherhood submitted the question to this Board, asking for a declaration that the Carrier had violated Award 282 by reducing the crew consist of a conductor and two brakemen to a consist of a conductor and one brakeman on certain main line and branch line freight trains and on certain main line passenger trains. On July 9, the Brotherhood filed in the United States District Court for the District of Columbia a motion for supplemental relief against the Carrier in the form of an order requiring it to comply with Award 282 and to cease and desist from effectuating any reduction in crew consist on any trains operating in road service from the crew consist which existed on the effective date of that Award. The motion also asked that the employees heretofore displaced be restored to their former positions with back pay. On August 6, Circuit Judge Miller, sitting by designation and assignment, ordered that the Brotherhood's motion be "held in abeyance until Arbitration Board No. 282 has answered [BRT] Question No. 33 . . . ."

In a supplemental filing, submitted on August 12, the Brotherhood takes the position, based on language in Judge Miller's memorandum opinion, that it has been judicially determined that a change in *any* train crew consist existing on the effective date of Award 282 can be made only in accordance with procedures set forth in that Award, whether or not such crew consist was established by a rule requiring a stipulated number of crewmen. The BRT specifically asks us, in addition to answering Question 33, to place this same construction on the relevant provisions of Award 282.

BRT Question 36 is a long, multipart question involving disputes over the reduction of train crew consists with the Missouri Pacific Railroad Company, the Natchez & Southern Railway Company, and the Texas & Pacific Railway Company. Notices of proposed changes in rules governing crew consists were served on the Brotherhood by these Carriers on January 25, 1964. In all, four notices were served (two by the Missouri Pacific), and four special boards, each with the same neutral member, were established by the National Mediation Board. The Brotherhood

refused to participate in proceedings before any of the special boards. All four boards handed down their awards on May 6, 1964, and the Carriers announced their intention to put the awards into effect on May 11, 1964. On the latter date, the BRT filed a complaint in the United States District Court for the Eastern District of Missouri and obtained a temporary restraining order against effectuation of the awards. Subsequently, on May 28, 1964, following a hearing, District Judge Meredith dismissed the complaint and dissolved the injunction.

The Brotherhood then filed a motion for supplemental relief in the impeachment proceedings which had been brought in the United States District Court for the District of Columbia. On June 9, 1964, District Judge Holtzoff issued an order denying the injunctive relief requested by the BRT, and the Brotherhood announced its intention to appeal. While that appeal was pending before the Court of Appeals for the District of Columbia, that court rendered the decision previously noted in the Milwaukee Railroad case. Thereafter, on June 24, 1965, the court ruled on the appeal in the instant case. Speaking this time through Circuit Judge Danaher, the court cited Judge Bazelon's earlier opinion in the Milwaukee case and concluded:

> We have not had the views of Arbitration Board 282 on two questions: (1) whether or not the Special Boards of Adjustment had been required to conduct the arbitrations in compliance with sections 7 and 8 of the Railway Labor Act; and (2) whether or not the notices which were served by the Carriers proposing changes in the crew consist complied with the directives of Board 282 by clearly identifying the assignments or the operations affected by the proposed changes.
>
> We are satisfied that such questions properly come within the purview of the Board's primary jurisdiction. Thus, we remand with directions that the District Court enter its appropriate order with respect to the Brotherhood's motion for supplemental relief. The order will include permission to any party, as it may

be advised, and within a time fixed by the court, to submit further application to Board 282 that consideration may there be afforded with respect to the questions above specified.

On September 13, 1965, following the remand, Judge Holtzoff issued another order denying the Brotherhood's motion for supplementary relief without prejudice to the submission, within 30 days, of an application by any party to Arbitration Board 282 "to consider the following [three] questions." The first two questions specified in the court's order are the same as those numbered (1) and (2) in the excerpt from Judge Danaher's opinion quoted above. The third reads as follows: "What significance should be attached to the failure of the Brotherhood . . . to raise the issues contained in questions 1 and 2 above before the Special Boards of Adjustment." BRT Question 36 was submitted to this Board on August 4, 1965. Although it includes many questions in addition to those listed in Judge Holtzoff's order of September 13, we believe the Brotherhood is entitled to answers to all of them.

The foregoing recital of the events preceding our consideration of BRT Questions 32, 33, and 36 is sufficient explanation for our departure from the usual manner of answering questions involving the interpretation of our Award. Moreover, in a further departure from our usual procedure, we heard oral argument on these three questions by counsel for the interested parties and received extensive briefs. Having had the benefit of these oral and written arguments, we believe it important not only to answer the specific questions presented to us, but also to clarify for all parties to this Award some of the broader issues involved.

Considerable controversy has been generated over the nature and legal status of the special boards of adjustment provided for in Section III, Part B, of Award 282. There can be no doubt of the Board's intention in this regard, nor do we think the relevant provisions of the Award are reasonably susceptible of a contrary interpretation. The special boards of adjustment contemplated by Board 282 are unique creations, differing from both the

statutory arbitration boards provided for in Section 7 of the Railway Labor Act and the National Railroad Adjustment Board and system, group, and regional boards provided for in Section 3 First and Second of the Act, respectively. They are ad hoc arbitration boards; their structure and function were specially designed to meet the peculiar needs of the parties affected by Section III of the Award.

The problem facing Board 282 was to provide a means for the final disposition of disputes over the size of train crews subject to challenge, on the local properties, in accordance with the guidelines set forth in Section III, Part C, of the Award. It was equally important that these dispositions be made as promptly as the requirements of a full and fair hearing and adequate time for deliberation could permit. The types of boards provided for in Sections 3 and 7 of the Railway Labor Act were obviously not suited for these purposes. The procedures of the National Railroad Adjustment Board are notoriously slow, and the existing backlog of cases in the First Division made it certain that most, if not all, of the anticipated disputes over crew consists would not be heard during the life of Award 282. Likewise, the procedures for the establishment and conduct of statutory arbitration boards under Section 7 of the Act were too cumbersome and formal for our purposes; moreover, by definition, they depend for their establishment upon "agreement of the parties," which was obviously lacking in this case. Accordingly, the Board directed that crew consist disputes be submitted to special boards of adjustment, specially designed for the task, in accordance with those procedural requirements deemed necessary to insure a prompt, equitable, and final disposition of these controversies.

The organizations affected by the Award argue that these special boards of adjustment are bound by the rules applicable to the statutory arbitration boards provided for in Section 7 of the Railway Labor Act. We reject that contention as completely erroneous. Section 7 First of the Act provides for a board of either three or six persons; our Award stipulates a board of three. Section 7 Third (f) requires that the arbitration board shall furnish

a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings certified by at least a majority of the board, to the clerk of the federal district court for the district in which the controversy arose, and that certified copies shall also be filed with the National Mediation Board and the Interstate Commerce Commission. Our Award imposes no such requirements. Thus, the logic of the organizations' argument forces them to concede that an award rendered by a Special board of adjustment pursuant to the procedures and guidelines laid down in Award 282, which has been accepted by the parties and put into effect, can nevertheless be voided by either party at some future date because certified copies of the record were not filed with the court, the Mediation Board, and the Commission. We think such a conclusion is plainly contrary to the letter and the spirit of Award 282.

There is nothing to be gained by listing all the differences between Section 7 boards and the special boards of adjustment provided for in Award 282. It should be specially noted, however, that Section 7 Third (e) provides for compensation of the neutral arbitrators by the Mediation Board, whereas Section III B (3) of our Award declares that the "costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement." Finally, we call attention to the omission (which was deliberate) from our Award of the elaborate procedural requirements set forth in Section 8 of the Act.

It is true that Section 4 of Public Law 88-108, which established Board 282, states that "To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of the said Act." We think it clear that the quoted language applies only to Board 282 and not to the special boards of adjustment provided for in its Award. Whether

the decision in *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago B. & Q. R.R.*, 225 F. Supp. 11 (D.D.C.), *aff'd*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964), upholding the validity of the Award, is *res judicata* in so far as this issue is concerned, is a judicial question as to which we venture no opinion. We do affirm, however, that it was never our intention that the special boards of adjustment for which we provided would be subject to Sections 7 and 8 of the Railway Labor Act.

Perhaps the most distinguishing feature of the special boards of adjustment provided for in Award 282 is that they are compulsory. Doubtless, this was taken into account by Judge Bazelon, and was responsible in part for his observation that "The Board's delegation of the crew consist issue to special boards should not mean that such boards, and in particular their single neutral members, could settle a dispute by compulsory arbitration without being subject to any meaningful review." We turn, therefore, to a discussion of "meaningful review".

At the outset, we wish to emphasize that, in our judgment, a "meaningful review" in the context of Award 282 is not a trial de novo. As we have repeatedly stated, our purpose in providing for special boards of adjustment was to bring about prompt and final settlement of disputes over crew consists. We recognized that these disputes were complex and varied, and that they could be equitably resolved only after a careful and detailed examination of local conditions and the application of the guidelines laid down in the Award. A trial de novo, following an appeal to Board 282 from the decision of a special board, would thus defeat the entire purpose of our decision. It would not only make it impossible to dispose finally of more than a few cases during the statutory life of the Board; it would also contradict the underlying assumption that sound rulings could be based only upon an intimate knowledge of local conditions.

Even if we were otherwise disposed to grant trials de novo in these disputes, we would be foreclosed from doing so by Public Law 88-108. Whatever the legal status of the special boards of adjustment may be, Board 282 is

governed by the provisions of Sections 7 and 8 of the Railway Labor Act. Section 7 Third (c), as applied to this Board, provides that it may be reconvened on the motion of either party "to pass upon any controversy over the meaning or application" of *its* Award, but that "No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board . . . ." In short, the Board is prohibited by the statute from interpreting any award but its own.

How, then, can this statutory restriction on the Board's jurisdiction be squared with the concept of "meaningful review"? We think the answer is suggested in footnote 4 of Judge Bazelon's opinion:

> We upheld the Board's authority to delegate the crew consist issue to special boards in *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, B. & Q. R. Co.* . . . . But *cf. Schechter Poultry Corp.* v. *United States* . . . which holds that delegated authority must be defined by legislative standards; meaningful review procedures ensure that such authority is exercised within those standards.

In our judgment the applicable standards in this case are those specified in Award 282, and "meaningful review" involves neither more nor less than a determination whether a challenged decision by a special board has followed the procedures and applied the guidelines set forth in Section III, Parts A, B, and C, of that Award.

Whether or not a party has been deprived of due process in the constitutional sense is, of course, a question for the courts. We consider it part of a "meaningful review," however, to determine whether either party to a proceeding before a special board was deprived of a full and fair hearing, as that concept is normally understood and applied to ad hoc arbitration proceedings. In this sense due process does not require observance of the detailed procedural requirements of Section 8 of the Railway Labor Act. Moreover, we deem it incumbent upon any party seeking

a meaningful review of the decision of a special board to make such review possible by filing a timely objection to the proceedings and by providing us with an adequate record. A party which refuses to participate in the proceedings before the special board and files its formal objection only after decision has been rendered is, in the absence of extenuating circumstances, properly estopped from protesting that its procedural rights have been violated. As pointed out in footnote 7 of Judge Danaher's opinion,

> Courts will not lightly view a party's failure to request certain procedural rights, or even refrain from participation only thereafter to await the outcome and then challenge an unfavorable result. See United States v. Tucker Truck Lines, 344 U.S. 33, 37 (1952).

By the same token, a party wishing review of a decision by a special board must assume the obligation of providing a verbatim transcript or other satisfactory evidence of the proceedings before that board. If the opposing party refuses to share the cost of a transcript, and the neutral arbitrator determines, in the exercise of his discretion, that a transcript is unnecessary, the party desiring one is nevertheless entitled to have it; but with that right comes the obligation to pay the cost.

Pending its review of the record of the proceedings before Judge Robinson, the Board defers its answers to B.R.T. Question No. 32(A) and (B). The answers to B.R.T. Questions Nos. 32(C) and (D), 33, and 36(A), (B), (C), and (D) are set forth below.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 499

BROTHERHOOD OF RAILROAD TRAINMEN, PETITIONER

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND RALPH T. SEWARD, CHAIRMAN OF ARBITRATION BOARD 282

No. 500

BROTHERHOOD OF RAILROAD TRAINMEN, PETITIONER

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE MISSOURI PACIFIC RAILROAD COMPANY, NATCHEZ AND SOUTHERN RAILWAY COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY, RALPH T. SEWARD, CHAIRMAN OF ARBITRATION BOARD 282 AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RALPH T. SEWARD AND UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 499 (Pet. App. 1a–2a) is not yet reported. The opinion

of the district court in No. 499 is reported at 252 F. Supp. 961.

The opinion of the court of appeals in No. 500 (Pet. App. 1a–6a) is not yet reported. The opinion of the district court in No. 500 is reported at 248 F. Supp. 1008.

JURISDICTION

The opinion and judgment of the court of appeals in both No. 499 and No. 500 were entered on May 19, 1967. The petitions for writs of certiorari were filed on August 16, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The principal question presented by these two petitions is whether petitioner is barred, under principles of *res judicata,* from relitigating the question whether the special boards of adjustment, created under the Award of Arbitration Board 282, were required to conduct their proceedings in conformity with Sections 7 and 8 of the Railway Labor Act, where that issue could have been raised in earlier litigation between the same parties in which the validity of the Award of Arbitration Board 282 was sustained.

A subsidiary question presented by the petition in No. 500 is whether petitioner may complain of the procedures employed by special boards of adjustment in proceedings in which petitioner refused to participate and, hence, never objected to the procedures employed.

STATEMENT

The present litigation arises from a lengthy dispute between the railroads and their unions regarding the

abolition of firemen's jobs and the composition of crews in road and yard service. In August 1963, the inability of the parties to compose their differences led to the passage by Congress of Public Law 88–108 (77 Stat. 132), which provided for the establishment of an arbitration board. That board, known as Arbitration Board 282, rendered its award on November 26, 1963, to be effective on January 25, 1964.

Section III of the Award dealt with the composition of road and yard crews. Board 282 found that a national prescription of crew size would be unrealistic,[1] and its Award therefore provided for disposition of the "crew consist" issue on a local basis in accordance with procedures and guidelines specified in the Award. The Award provided that, if the union and railroad could not reach agreement upon proposed changes in existing crew-consist rules, the dispute was to be referred to a local special board of adjustment. One member of the special board was to be named by each of the two disputants, and a third member was to be chosen by the two partisan members or, if they could not agree, by the National Mediation Board. The decision of the majority of each special board was to be binding on both parties. The Award set forth in detail guidelines which special boards were to follow in making their binding dispositions. They were instructed to take account of such factors as the requirements of safety, the avoidance of unreasonable burdens on crew members, changes in operating conditions, the physical characteristics of

[1] See Opinion of the Neutral Members, 41 Lab. Arb. 680, 694 (1964).

the line to be traversed, and the number of highway crossings to be protected.

Although Section 4 of Public Law 88–108 provided that the proceedings before the statutory arbitration board (*i.e.*, Board 282) were to be conducted in accordance with Sections 7 and 8 of the Railway Labor Act (45 U.S.C. 157, 158) "to the extent not inconsistent" with Public Law 88–108, the Award of Board 282 did not impose a similar requirement on the special boards of adjustment. Indeed, in a number of respects the Award of Board 282 established rules of procedure for the special boards quite different from those specified in Sections 7 and 8 of the Railway Labor Act. For example, Section 7, Third(e) of the Act, provides that the National Mediation Board shall bear the expenses of neutral arbitrators; Section III–B(3) of the Award, on the other hand, provided that "the costs and expenses of the neutral member [of each special board] and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement" (J.A. No. 500,[2] p. 7). In general, Board 282 determined that resolution of crew-consist disputes by special boards would best be served by more informal and expeditious procedures than those provided by the Railway Labor Act.[3]

[2] "J.A. No. 500" refers to the Joint Appendix filed in the court of appeals in No. 500. "J.A. No. 499" refers to the Joint Appendix filed in the court of appeals in No. 499.

[3] In response to a question presented by petitioner, Board 282 pointed out (J.A. No. 500, pp. 59–62):

> * * * The procedures for the establishment and conduct of statutory arbitration boards under Section 7 of the Act were too cumbersome and formal for our purposes;

In an action brought by petitioner and several other unions, both the constitutionality of Public Law 88-108 and the validity of the Award of Board 282 were sustained. *Brotherhood of Loc. F. & E.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C.), affirmed, 331 F. 2d 1020 (C.A.D.C.), certiorari denied, 377 U.S. 918. As the district court opinion in that case discloses, the unions attacked the validity of the Award on numerous grounds; they did not, however, contest the failure of the Award to require the special boards of adjustment to conduct their proceedings in conformity with Sections 7 and 8 of the Railway Labor Act.

On January 25, 1964, after the district court's decision in *Brotherhood of Loc. F. & E.* v. *Chicago,*

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moreover, by definition they depend for their establishment upon "agreement of the parties," which was obviously lacking in this case. Accordingly, the Board directed that crew consist disputes be submitted to special boards of adjustment, specially designed for the task, in accordance with those procedural requirements deemed necessary to insure a prompt, equitable, and final disposition of these controversies.

* * * * *

Section 7 First of the Act provides for a board of either three or six persons; our Award stipulates a board of three. Section 7 Third(f) requires that the arbitration board shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified by at least a majority of the board, to the clerk of the federal district court for the district in which the controversy arose, and that certified copies shall also be filed with the National Mediation Board and the Interstate Commerce Commission. Our Award imposes no such requirements.

B. & Q. R. Co., supra, but before the court of appeals had affirmed that decision, several carriers invoked the procedures of the Award by serving petitioner with notices of proposed changes in rules governing crew composition.

With respect to the carriers involved in No. 500—the Missouri Pacific, Texas and Pacific, and Natchez & Southern Railroads—petitioner flatly refused to negotiate over the proposed changes, contending that the carriers' notices had been served prematurely (J.A. No. 500, pp. 72, 83, 92, 101). Thereafter, when special boards of adjustment were convened, petitioner refused to participate in the proceedings before them. These special boards therefore made findings and awards based upon the written evidence and arguments submitted by the carriers.[4]

With regard to the carrier involved in No. 499, petitioner did participate in the special board proceedings, although it objected to the conduct of the hearing

> * * * except and unless proceedings of the Board are handled in accordance with Sections 7 and 8 of the Railway Labor Act; that is, that the Board be in a position to make a transcript of all proceedings and take evidence under oath and mark all exhibits with a number and enter them in evidence. [J.A. No. 499, p. 28.]

[4] Petitioner's assertion (Pet. No. 500, p. 5) that the special boards authorized all changes requested by the carriers is contrary to the record, which shows that several proposals were rejected as not justified under the guidelines set forth in the Award, or as being outside the scope of the Award (see J.A. No. 500, pp. 76–79, 87, 96, 98).

This position was rejected by the special board. However, petitioner's requests that it be furnished a copy of the carrier's written submission and that testimony be taken under oath were granted. At the start of the hearing, each party was told that it could arrange to have a court reporter make a transcript of the proceeding if it so desired. Neither the carrier nor petitioner made such an arrangement (J.A. No. 499, p. 42).

Following the completion of the special board proceedings, petitioner commenced an action to enjoin the carriers in No. 500 from reducing crews in accordance with the special board awards. On June 8, 1964, the district court denied this relief, rejecting, *inter alia,* petitioner's contention that the special boards were required to follow the procedures of Sections 7 and 8 of the Railway Labor Act. 231 F. Supp. 519 (D.D.C.). On June 24, 1965, the court of appeals, however, ruled that "such questions properly come within the purview of [Board 282's] primary jurisdiction," and remanded the case to the district court with instructions to afford the parties an opportunity to seek clarification from Board 282. *Brotherhood of R. Trainmen* v. *Certains Carriers,* 349 F. 2d 207 (C.A.D.C.).

Petitioner then inquired of Board 282 whether special boards of adjustment were required to comply with the procedures set forth in Sections 7 and 8 of the Railway Labor Act.[5] Board 282 replied in the negative (J.A. No. 500, pp. 54–71; J.A. No. 499,

[5] See Question 36 (J.A. No. 500, pp. 66–71) and Question 47 (J.A. No. 499, pp. 77–78).

pp. 77–78). The Board explained that it "was never our intention that the special boards of adjustment * * * would be subject to Sections 7 and 8," that the omission of such procedural requirements from the Award was "deliberate," and that the Award had left no doubt of the Board's intentions in this regard (J.A. No. 500, pp. 59–61).

Petitioner then initiated the present proceedings to impeach the Board's explanatory rulings. The district court sustained the Board's rulings in two decisions. 248 F. Supp. 1008; 252 F. Supp. 961. On May 19, 1967, the court of appeals affirmed both of the district court's decisions on the ground that the petitioner's failure to raise the issue of whether special boards of adjustment were required to conform to requirements of Sections 7 and 8 to the Railway Labor Act, in its previous challenge of the validity of the Award of Board 282,[6] barred the present attack on the procedures followed by the special boards (Pet. App. No. 499, pp. 1a–4a; Pet. App. No. 500, pp. 1a–6a). In No. 500, the court sustained the rulings of Board 282 and the district court on the additional ground that petitioner could not complain of the procedures followed by special boards in which it deliberately refused to participate (Pet. App. No. 500, pp. 4a–6a).

ARGUMENT

The court below was clearly correct in ruling that its previous decision upholding the validity of the

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[6] *Brotherhood of Loc. F. & E. v. Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C.), affirmed, 331 F. 2d 1020 (C.A.D.C.), certiorari denied, 377 U.S. 918.

Award of Board 282, *Brotherhood of Loc. F. & E.* v. *Chicago, B. & Q. R. Co., supra,* was *res judicata* as to the question of whether special boards of adjustment were required to follow the procedures set forth in Sections 7 and 8 of the Railway Labor Act. The *res judicata* question, as well as the issue as to the procedures to be followed by special boards, turn on the peculiar circumstances surrounding the Arbitration Award under Public Law 88–108, which Award expired by its own terms in early 1966. Those issues are not likely to recur, no conflict between the circuits is involved, and further review by this Court seems unwarranted.

1. It is well settled that "a judgment for the merits in one suit is res judicata in another, where the parties and the subject matter are the same, not only as respects matter actually presented to sustain or defeat the right asserted but also as to any other available matter which might have been presented." *Midessa Television Co.* v. *Motion Pictures for Television, Inc.,* 290 F. 2d 203 (C.A. 5), certiorari denied, 368 U.S. 827; *Calvin* v. *Calvin,* 214 F. 2d 226 (C.A.D.C.); see also, *Commissioner* v. *Sunnen,* 333 U.S. 591, 597; *Cromwell* v. *County of Sac,* 94 U.S. 351, 352.

The present actions fall squarely within that principle. Petitioner clearly could have contested the very issue it raises here when it attacked the validity of the Award of Board 282, for that Award not only did not require the special boards to follow Sections 7 and 8 of the Railway Labor Act, but specified a number of procedures quite different from those specified in that Act. Indeed, in the earlier

action, petitioner did attack, unsuccessfully, one of the procedures (for the sharing of costs of the neutral arbitrator) which clearly was not in conformity with Section 7, albeit the attack was not on that ground. See 225 F. Supp. at 21.[7] It is evident that, were petitioner's contentions accepted here, the Awards itself would be invalid insofar as it failed to require special boards to comply with Sections 7 and 8. Having had full opportunity to litigate the validity of the Award, petitioner may not undercut it, after adjudication, in these collateral proceedings.

The present actions are a particularly undesirable form of piecemeal litigation. The Award of Board 282 called for expeditious local disposition of the crew-consist issue (J.A. No. 500, pp. 6–7). Yet with time of the essence, petitioner waited until the special boards exercised the freedom from what Board 282 deemed the "cumbersome" procedures of Sections 7 and 8 (J.A. No. 500, p. 60) and then sought by the present litigation to undo the work of the special boards, thus precluding the prompt settlement of the issue. In these circumstances, the court of appeals properly held the suits barred by *res judicata*.

2. In No. 500, the court of appeals also correctly ruled that the attack on the procedures employed by the special boards was precluded by petitioner's deliberate refusal to participate in the proceedings. It is settled that a party may not upset an administra-

[7] Petitioner contended that Board 282 "lacked authority to require the parties to bear the expenses of neutral members of the local adjustment boards." Section 7, Third(e) of the Railway Labor Act, 45 U.S.C. 157, Third(e), provides that the National Mediation Board shall bear such expenses.

tive or arbitral determination on grounds not raised before the decision-making body, particularly where the objections are procedural. *E.g., United States* v. *Tucker Truck Lines,* 344 U.S. 33, 37; *Bower* v. *Eastern Airlines,* 214 F. 2d 623, 627 (C.A. 3), certiorari denied, 348 U.S. 871; *Marquette Cement Mfg. Co.* v. *Federal Trade Commission,* 147 F. 2d 589 (C.A. 7).

3. We also note that there is no merit in petitioner's underlying contention that its rights under Public Law 88–108 and the Due Process Clause were violated by the failure of Board 282 to require the special boards to follow the procedures of Sections 7 and 8 of the Railway Labor Act, particularly by providing transcripts of their proceedings. None of the special boards refused to permit petitioner to have a transcript of the proceedings, if it desired. The board in No. 499, before which petitioner appeared, expressly invited either party to make a transcript. Petitioner can hardly complain that its right to "meaningful review" is frustrated by the lack of a transcript which it could have obtained, had it chosen to do so. Surely, in the absence of a showing of indigence, the failure to provide petitioner with a *free* transcript cannot impair any constitutional right. Moreover, it is not generally required that formal records be made in arbitral proceedings. See *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 203–204, n. 4.[8] For

[8] A transcript of oral testimony is not in fact essential to the limited review which may be obtained of the final and binding decision rendered in arbitration. The decision of an arbitrator is not subject to review on the merits; it is at most reviewable to determine whether the arbitrator stayed within the sub-

example, transcripts of oral testimony are not ordinarily made in proceedings before the National Railroad Adjustment Board (See J.A. No. 500, p. 19).

Similarly, the argument that Public Law 88–108 required that the particular procedures of Sections 7 and 8 of the Railway Labor Act be followed by the special boards of adjustment is without merit. The "arbitration" that Public Law 88–108 required to be conducted in accordance with Sections 7 and 8 of the Railway Labor Act was the arbitration by Board 282; that arbitration was, under Section 3 of Public Law 88–108, to "constitute a complete and final disposition" of the issues. The contention by petitioner and other unions in *Brotherhood of Loc. F. & E.* v. *Chicago B. & Q. R. Co., supra,* that the Award of Board 282 was invalid because it did not finally dispose of the issues insofar as it provided for further proceedings before local special boards of adjustment, was explicitly rejected. 225 F. Supp. at 20–21, affirmed, 331 F. 2d 1020. Hence, petitioner's present argument that the special boards of adjustment were required to adhere to the procedures of Sections 7 and 8 because part of the arbitration which Board 282 was required to conduct in accordance with those sections was delegated to the special boards is merely repetitive of the rejected contention that Board 282 failed to complete its statutory assignment. If Congress left Board 282 with the leeway to create the local special boards, as settled in *Brotherhood of Loc. F. & E.* v. *Chicago, B. & Q. R. Co.*,

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mission agreement (or, in these cases, within the Award of Board 282). *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 598.

supra, surely Board 282 also acted within its authority in permitting those special boards to employ procedures flexible enough to accomplish the desired prompt, local disposition of the crew-consist issue.[9]

In all events, given the expiration of Public Law 88–108 in 1964 and of the Award of Board 282 in 1966, in accordance with their respective terms, none of these issues is of such prospective significance as to warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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[9] Board 282 expressly found that the procedures of Sections 7 and 8 were too formal and cumbersome to accomplish its purposes in establishing the special boards (J.A. in No. 500, p. 60).

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OCTOBER TERM, 1967

Nos. 499, 500

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner*,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN & SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, ETC., *Respondents*.

PETITIONER'S REPLY TO OPPOSITIONS TO PETITIONS FOR CERTIORARI

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PETITIONER'S REPLY TO OPPOSITIONS TO PETITIONS FOR CERTIORARI

Respondents' briefs give additional evidence of the importance of a determination by this Court of the validity of awards of Special Boards of Adjustment to which Arbitration Board 282 delegated substantially all of the arbitration of the crew-consist issue required by Public Law 88-108.

If the rulings of the Court below in *Akron & Barberton Belt R. Co., et al.* v. *Brotherhood of Railroad Trainmen* (referred to at page 9 of Respondents' Opposition in No. 500) become final and the changes in

crew consist which were authorized by Special Board awards continue until again changed in accordance with the Railway Labor Act, and if the information given by counsel for the United States is correct (Br. 7 in No. 500) that practically none of the special boards kept a stenographic record [as required by § 4 of Public Law 88-108 and § 7 Third (g) of the Railway Labor Act], it is most certainly of great importance to the railroads and the thousands of railroad employees, who work under those special board awards which changed their working conditions, for this Court to determine the question as to the validity of those rules to which those men have been, are, and may continue to be subject in their day by day work for an indefinite time in the future.

The importance of this Court determining the question is further magnified by the vacillating and conflicting opinions of Arbitration Board 282 and of the Courts below as shown in the petitions filed herein, the last of which decisions, by the Court below, would foreclose a determination of the validity of those Special Board awards after another panel of the Court below had, as it now appears, teased petitioner and the railroad employees represented by petitioner by leading them to believe in *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., et al.*, 345 F.2d 985 (1965) and *Brotherhood of Railroad Trainmen* v. *Certain Carriers, etc.*, 349 F.2d 207 (1965) that the validity of the awards would be determined by the courts after initial review by Arbitration Board 282. In the last mentioned case the carriers argued, as they did in these cases, that the judgment in the original impeachment suit was *res judicata*, and the Court, *sub silentio*, rejected that argument at that time and remanded the case for further proceedings.

If anything is *res judicata,* it would seem that the decision in 349 F.2d 207 should be *res judicata* that the decision in the original impeachment suit was not *res judicata* that the provisions of sections 7 and 8 of the Railway Labor Act do not apply to the proceedings of the Special Boards.

Respondents incorrectly argue (Br. 10 in No. 500) that petitioner does not contend that the ruling by Arbitration Board 282, purporting to excuse its delegee, the Special Board of Adjustment, from taking evidence under oath and making and certifying a transcript of its proceedings and of the evidence taken by it, was not a reasonable interpretation of its award. Petitioner does contend that such ruling by Board 282 and similar rulings by the Courts below were contrary to Public Law 88-108. Surely such a ruling would be "unreasonable" if it is in violation of the law.

Cases arising under the Administrative Procedure Act, such as *United States* v. *Tucker Truck Lines,* cited by the Court below and Respondents (Br. 10 in No. 500) are not relevant to this case. Public Law 88-108 required arbitration and required that it be conducted pursuant to §§ 7 and 8 of the Railway Labor Act and that it be subject to § 9 of that Act. Public Law 88-108 made no mention of the Administrative Procedure Act, but, instead, using mandatory language, provided for the arbitration to be conducted pursuant to the mandatory provisions of §§ 7, 8, and 9 of the Railway Labor Act—not the Administrative Procedure Act.

There is no inconsistency between § 4 of Public Law 88-108 and the Award of Arbitration Board 282 and those subsections of §§ 7, 8, and 9 of the Railway Labor Act as to *how* the arbitration should be conducted.

Section 4 of Public Law 88-108 provided that: "To the extent not inconsistent with this joint resolution, the arbitration shall be conducted pursuant to Sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act."

Only sub-sections Third (b), (f), (g), and (h) of § 7 of the Railway Labor Act are concerned with the *conduct* of an arbitration.

The Award of Arbitration Board 282 required the parties to the Special Board, for which it provided and to which it delegated the arbitration, to share the expenses of the neutral member, while § 7 Third (e) of the Railway Labor Act provides for the neutral to be paid by the National Mediation Board. That is the only inconsistency between the Award of Arbitration Board 282 and § 7 of the Railway Labor Act.

Surely that single inconsistency, having nothing to do with the actual conduct of an arbitration, should not have been a warning to petitioner in 1963 when it was required to institute an action to contest the validity of the Award of Board 282 that the Award could or should have been considered invalid because it did not expressly require a Special Board of Adjustment to comply with § 7 Third (b) which requires an arbitration board to give the parties a full and fair hearing including an opportunity to present evidence in support of their claims, either in person or by counsel, nor because it did not expressly require a Special Board of Adjustment to comply with that part of § 7 Third (h) which requires an arbitration board to take all testimony under oath, nor because it did not expressly require a Special Board to comply with that part of § 7 Third (g) which authorizes an arbitration

board to employ and pay assistants necessary to carry on the arbitration which could have been done consistently with the Award of Board 282, nor because the Award of Board 282 did not expressly require the Special Board of Adjustment to comply with that part of § 7 Third (f) which requires an arbitration board to make, certify, and file a transcript of its proceedings, of the evidence taken by it, and its award.

While the Award of Board 282 was silent as to those matters last mentioned, § 4 of Public Law 88-108 and § 7 of the Railway Labor Act were clear and mandatory as to them.

But the Court below ruled *res judicata* the question of whether the Special Boards were required to comply with those last mentioned requirements of § 7 of the Railway Labor Act on the theory that the Award of Board 282 would have been subject to impeachment by not expressly requiring compliance with them, notwithstanding § 4 of Public Law 88-108 did impose such requirements and notwithstanding no special boards could have then been convened so as to have conducted the arbitration delegated to them in compliance with or in violation of those requirements.

Petitioner's complaint has nothing to do with the validity of the Award of Arbitration Board 282. The complaint which petitioner makes could not have been made in December of 1963 when petitioner was required to institute an action to contest the validity of the Award of Board 282 except as a bare speculative possibility that the special boards would proceed in violation of the provisions of § 4 of Public Law 88-108 and §§ 7, 8, and 9 of the Railway Labor Act because the Award of Board 282 was silent as to whether they should so proceed.

Petitioner's complaint is and has been exclusively with respect to the validity of the awards of Special Boards of Adjustment, delegees of Board 282 which were not, as they could not have been, established until months after petitioner was required by § 4 of Public Law 88-108 and § 9 of the Railway Labor Act to institute an action, if any was to be instituted, to contest the validity of the Award of Board 282 and is based upon the failure of special boards to comply with § 4 of Public Law 88-108 and §§ 7, 8, and 9 of the Railway Labor Act in conducting the arbitration delegated to them as Arbitration Board 282 itself was required to and had done months before any special board was or could have been established.

Respectfully submitted,

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BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner*,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia entered in this case on May 19, 1967, Court of Appeals No. 19,867.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is not reported; it is attached hereto as Appendix "A", *infra*. The judgment of the Court of Appeals is attached hereto as Appendix "B", *infra*. The opinion of the District Court is reported at 248 F. Supp. 1008; it is attached hereto as Appendix "C", *infra*. Question No. 33 and the Answer of Board 282 to this Question

are not reported; they are attached hereto as Appendix "D", *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered May 19, 1967. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTION PRESENTED

Whether Public Law 88-108 permits Board 282 to authorize a railroad, simply because it denies there was a rule in effect within the meaning of Award 282, to reduce the number of trainmen in crew consist before Board 282 or any other impartial tribunal passes on the validity of such denial.

STATUTE INVOLVED

Public Law 88-108, 77 Stat. 132, 45 U.S.C. 157 (1966 Supp.) is set forth in Appendix "E", *infra*.

STATEMENT

In Public Law 88-108, Congress required the railroads and railroad unions to submit their dispute over the proper manning of trains to compulsory arbitration. The manning dispute concerned "firemen on diesels" and "crew consist", i.e., the number of employees in road and yard service. It is only the latter issue that is here involved.

The arbitration board (Board 282) established by Public Law 88-108 filed its award (Award 282) on January 25, 1964[1]; the validity of the Award, as well as the constitutionality of Public Law 88-108, was up-

[1] The text of Award 282 is unofficially reported in 41 Lab. Arb. 673 (1963).

held in *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 112 (1964), aff'd. 331 F. 2d 1020 (D.C. Cir. 1964), *cert. den.*, 377 U.S. 918 (1964).

The instant case, like the companion cases in which petitions for certiorari are being filed, arises from that portion of the Award 282 which deals with "crew consist". Board 282 concluded that this issue, unlike the "firemen issue", could not be resolved by a nationwide formula. It therefore provided a procedure which would enable either party seeking a change in the number of trainmen in a crew consist to invoke a local Special Board. Until the local Special Board ruled that the change was justified and would not endanger the safety of the remaining crewmen and traveling public, the established number of trainmen in the crew consist had to be maintained. Award 282, Part III, R. 5.

Despite this requirement, Respondent reduced crew consists on certain mainline freight and passenger trains and certain branch line freight trains from one conductor and two brakemen to one conductor and one brakeman without submitting these changes to a local Special Board. Respondent justified these reductions by pointing to its *own* assertion that there were no "rules" in effect, within the meaning of Award 282, which stipulated the number of trainmen on these runs. Petitioner disputed this assertion, and sought a ruling from Board 282 that the reduction violated Award 282. In its Answer to Question 33, Board 282 ruled, however, that Respondent's reduction could remain in effect until the National Railroad Adjustment Board decided whether or not there were such "rules" in effect.

REASONS FOR GRANTING THE WRIT

Disputes between carriers and railroads over manning trains are not new. As this Court stated in *Brotherhood of Locomotive Engineers* v. *Chicago, Rock Island & Pacific R. Co.*, 382 U.S. 423 (1966) at 429:

> "Since the railroad unions first gained strength in this country the problem of manning trains has presented an issue of constant dispute between the railroads and the unions. . . ."

Rather than permit the railroad unions to strike over this issue in 1963, Congress enacted Public Law 88-108. Section 3 of that law empowered Board 282 to "resolve matters on which the parties were not in agreement" at that time, and to render an award that would constitute "a complete and final disposition of these issues" for a period limited to two years from the date of the Award. Ibid at 433. In short, Public Law 88-108 constituted an immediate response to a particular problem.

Recently, Congress has indicated that, wherever it appears that collective bargaining disputes in the railroad industry cannot be resolved without a strike, it will adopt *ad hoc* legislation compelling binding arbitration of the underlying disputes (See, Public Law Disputes Act, Public Law 90-54, July 17, 1967).

Therefore, although Public Law 88-108 has expired, the instant case, which involves one facet of the conduct of Board 282, has an importance transcending the immediate issues and parties. The use of *ad hoc* compulsory arbitration statutes to solve collective bargaining disputes presents unique and critical legal questions. Equally important, of course, is the impact that the functioning and conduct of Board 282 and

the local Special Boards it created has had upon the safety of the railway employees and the public as well as upon the rights of the parties here.

The companion cases challenge the conduct of the local Special Boards on the ground that they acted outside the limitations placed upon their authority by Public Law 88-108. The challenge here is that Board 282 in its Answer to Question 33 failed to fulfill duties Congress imposed upon it.

It failed to fulfill these duties because this Answer to Question 33 interpreted its Award to permit Respondent to reduce crews without regard to the impact that such reductions would have upon the safety of the remaining trainmen and the traveling public. It permitted this simply because Respondent asserted that there was no "rule" established "by agreement, interpretation, or practice", as those terms are used in Award 282, in effect at the time Award 282 became effective. By sanctioning such reductions on the basis of unverified assertion by this answer, Board 282 abdicated its responsibility to give "due consideration to the effect of the proposed award upon adequate and safe transportation service." Public Law 88-108, Section 7, App. "E", *infra*. Obviously, Congress did not intend the safety of trainmen and the traveling public to depend upon unverified assertions of the railroads any more than it intended the minimum number of trainmen to depend upon unverified assertions of railroad unions. Otherwise, there would have been no need to establish an impartial tribunal to sift their competing claims.

Nor did Congress intend Board 282 to shift the responsibility to interpret its own Award to the National

Railroad Adjustment Board. Nevertheless, this is precisely what it did when it required the Petitioner to submit the question whether there existed a rule established by "agreement", "interpretation", or "practice", within the meaning of Award 282, to the National Railroad Adjustment Board. Congress could not have intended this delegation of responsibility because the First Division of the National Railroad Adjustment Board (the division to which these disputes had to be submitted) had, at the time Public Law 88-108 was enacted, "a backlog of approximately 7½ years work". H. R. Rep. No. 1114, 89th Cong., 1st Sess., a 3-5; S. Rep. No. 1201, p. 2. By the time the First Division could decide this question (unless Respondent agreed to expedite the determination) Board 282 and the Special Boards it created would have gone out of existence. And, Congress, of course, could not have anticipated that the railroads would agree to expedite such a determination.[2]

Congress also could not have intended this delegation of responsibility because it commanded Board 282, not the National Railroad Adjustment Board, to resolve all disputes over the crew consist issue. Obviously, to do this, Board 282 or a local Special Board had to first decide whether there was a rule stipulating the number of trainmen in order to decide whether that number should be reduced.

In short, by its Answer to Question 33, Board 282 failed (1) to give due regard to the safety of the trainmen or the traveling public; (2) to resolve the dispute between the parties over the meaning of its

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[2] Board 282 apparently considered it significant that Respondent asserted it was willing "to expedite the determination of this issue of fact in the present case". App. "D".

Award; or (3) to resolve the underlying manning dispute between the parties. None of these results can be reconciled with Public Law 88-108.

Thus, this case raises a novel question which the Court has never passed on: the extent to which a compulsory arbitration board must affirmatively carry out the duties which Congress has entrusted to it. Unless this Court answers this question, confusion on the part of future compulsory arbitration boards and the parties subject to them will continue to impair both the fairness and the effectiveness of compulsory arbitration as a method of resolving collective bargaining disputes.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion Below.

Before Bastian, *Senior Circuit Judge,* Burger and Wright, *Circuit Judges.*

Burger, *Circuit Judge:* These appeals challenge the District Court's dismissal of objections filed by the Brotherhood of Railroad Trainmen (BRT) to Arbitration Board 282's answers of certain questions submitted to it by the BRT.

Little background need be set out since this case is merely the latest manifestation of a litigation syndrome that seems to keep the railroads and various governmental entities in the courts on an ancient issue.[1] It is sufficient here to note that, to head off a threatened national strike in 1963, Congress directed that unresolved issues be submitted to binding arbitration,[2] which was to be conducted pursuant to sections 7, 8, and 9 of the Railway Labor Act;[3] that Arbitration Board 282 made its Award later in that year; and that the portion of the Award here relevant delegated to local Special Boards of Adjustment resolution of disputes over the size and composition of train crews ("crew consist").

The appeal is directed at two questions. The first inquired of Arbitration Board 282 whether a carrier violated the terms of the Award by reducing its crews prior to disposition of the matter by the local Special Board. Board

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[1] The dispute is chronicled in Bhd. of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. R. Co., 225 F. Supp. 11 (D. D. C.), *aff'd,* 118 U. S. App. D. C. 100, 331 F. 2d 1020, *cert. denied,* 377 U. S. 918 (1964), and in Bhd. of Railroad Trainmen v. Akron & Barberton Belt R. R. Co., No. 20,152, D. C. Cir., May 12, 1967.

[2] Joint Resolution, Public Law 88-108, 77 Stat. 132 (1963).

[3] 44 Stat. 582, 584, 585 (1926), as amended, 45 U. S. C., §§ 157, 158, 159 (1964).

282's Award had remanded the issue of "crew consist" to the local Special Boards with the requirement that "no change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, interpretation, or practice. . . . " The BRT complains that Board 282 answered its question by finding: "the Award bars changes in the scope or application of 'rules' in effect immediately prior to the effective date of this Award requiring a stipulated number of trainmen, whether such 'rules' were established by agreement, interpretation or practice. Where no such 'rule' was in effect immediately prior to the effective date of the Award, this bar does not apply." There is obviously no difference between the Award and the Board's interpretation of it; but Appellant also argues that the courts had interpreted the Award differently and that this construction was necessary to prevent the Award from failing to resolve the controversy and thus be contrary to the instruction of Congress.

In his opinion affirming the validity of Arbitration Board 282's Award, the District Judge summarized the Board's action by saying "what the Board did was to bar any changes for the time being. . . . "[4] Appellant claims this

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[4] Bhd. of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. R. Co., *supra* n. 1, 225 F. Supp. at 20. Appellant points also to similar statements by two other judges. In one, the opinion was expressly dealing with a change in a rule or in rule application, and statements that no change could be made were shorthand for "change in rule or in rule application." Chicago, Milwaukee, St. Paul & Pacific R. R. Co. v. Order of Ry. Conductors & Brakemen, 229 F. Supp. 178 (W. D. Wash. 1964). In the other, Judge Miller, sitting as a District Judge, stated that Judge Holtzoff had determined that no changes should be made in "crew consist" and noted that this had been directed only at the issue of the finality of Board 282's disposition; Judge Miller expressly left open the question of the meaning of the Award and directed that Board 282 first decide the question. Certain Carriers, etc. Misc. No. 40-63, D. D. C. Aug. 6, 1965.

forbade any changes irrespective of whether a rule was in existence. This argument is at best disingenuous; read in context it is clear beyond doubt that the District Judge was merely summarizing the Award preparatory to meeting the challenge that it was not a final disposition of the issues and thus violative of the enabling statute. Whether the railroad could make changes if there were no rule or practice in effect was irrelevant to the issue. The District Court decided that the Award adequately disposed of the issues and was valid; his decision was not premised on any particular definition of or comment concerning the Award.

Appellant's second major contention is that the Special Boards of Adjustment, like Arbitration Board 282, were to operate pursuant to the Railway Labor Act; specifically, it urges that they were required to take all evidence under oath and to keep a transcript of their proceedings. Its argument is twofold. It claims first that the statute setting up compulsory arbitration subject to the Railway Labor Act established the same standard for the local Special Boards of Adjustment and secondly that the Arbitration Board erred in interpreting its Award by saying that it did not include this requirement. We need not consider the merits of these claims except to point out that the statutory argument is now precluded as being *res judicata* by virtue of the earlier review of the Award[5] and that our

[5] In the action to impeach the Award, to which the BRT was a party, the unions claimed that the Award did not satisfy the requirements of Public Law 88-108; the District Court held that it did. Bhd. of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. C. Co., *supra* n. 1. The BRT's identical claim in this litigation, therefore, is determined by considerations of *res judicata*. The fact that it apparently did not urge this particular theory of illegality at the time of its impeachment action is, of course, irrelevant. A party may not litigate one issue and then, upon an unsuccessful disposition, revivify the same cause of action with a new theory. In any case, the BRT must have

review of the Board's answer to the BRT's question with respect to what its Award required is determined by Section 9 of the Railway Labor Act and is therefore quite limited. It is sufficient to note that Appellant will not be heard to make these arguments at this late date.

The Special Boards of Adjustment were convened in the spring of 1964. Appellant refused to participate "on the ground that . . . final judgment of the court had not been entered in the proceeding which had been instituted to impeach the Award of Arbitration Board 282."[6] Although its motive is irrelevant, it is interesting to note that Appellant refused to participate in the proceedings even after the Award had been revised and the Supreme Court had denied it a writ of certiorari.

Having thus purposefully refused to participate, it now complains because the evidence was not taken under oath and transcripts not prepared by the Special Boards. Procedural objections to the action of an administrative agency or trial court must be timely made to give the tribunal an opportunity to correct the error, if error there be; such

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been aware at that time of the theory it now urges. It argued that Board 282 lacked authority to require the parties to bear the expenses of the neutral members on the local Special Boards since the parties had agreed to permit the government to bear the cost; yet it surely must have known that Section 7 Third (e) of the Railway Labor Act requires the government to pay. It was in a position, therefore, to realize that Board 282's Award did not call for the local Special Boards to act pursuant to the Railway Labor Act. There is no basis for the argument that the BRT could assume that the local Special Boards would be conducted in accordance with the Railway Labor Act and that the divergence from that Act was not in the Award but in the later actions of the Special Boards.

[6] It says that its refusal to participate was also based on the railroads' notices being more general than what was permitted by the Award; its record citations, however, do not support this.

contentions cannot first be made on appeal.[7] It is imperative to an efficient and fair administration of justice that a litigant may not withhold his objections, await the outcome, and then complain that he was denied his rights if he does not approve the resulting decision.

But even more than that is involved here. Appellant is not lamenting merely about alleged procedural defects which it should have raised earlier; it is complaining about a lack of certain procedures which were *made irrelevant by its purposeful absence.* The Special Boards of Adjustments were limited, by Appellant's absence, to receiving documentary evidence submitted by the carriers. Since Appellant was not present to challenge the carriers, there was no occasion for a formal hearing in the usual sense; there was, therefore, no one to whom to give an oath and no testimony to transcribe. A party may not allege on appeal as error an action which he had induced the tribunal to take;[8] by boycotting the Special Boards of Adjustment, the Appellant did not merely induce the alleged errors but

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[7] *E.g.*, United States v. Tucker Truck Lines, Inc., 344 U. S. 33, 37 (1952); Bower v. Eastern Airlines, Inc., 214 F. 2d 623, 627 (3d Cir.), *cert. denied*, 348 U. S. 871 (1954); United States v. Five Cases, 179 F. 2d 519, 523 (2d Cir.), *cert. denied*, 339 U. S. 963 (1960). Indeed in our earlier consideration of the question of the applicability of the Railway Labor Act to the Special Boards of Adjustment, when we suggested presenting the problem to Board 282, we noted, "Courts will not lightly view a party's failure to request certain procedural rights, or even refrain from participation only thereafter to await the outcome and then challenge an unfavorable result." Bhd. of R. R. Trainmen v. Certain Carriers, 121 U. S. App. D. C. 230, 232, 349 F. 2d 207, 209 n. 7 (1965).

[8] *E.g.*, Bowman v. Curt G. Joa, Inc., 361 F. 2d 706, 716 (4th Cir. 1966); Cranston Print Works Co. v. Public Service Co., 291 F. 2d 638, 649 (4th Cir. 1961); Livingston v. Shreveport-Texas League Baseball Corp., 128 F. Supp. 191, 203 (W. D. La. 1955), *aff'd*, 228 F. 2d 623 (5th Cir. 1956).

also made them necessary if the disputes were to be settled promptly.

Appellant's arguments that conditions caused by its refusal to participate require reversal of the awards is nothing more than another way of saying that it should have complete veto power over the operation of these public Boards by the simple device of declining participation.

Affirmed.

Wright, *Circuit Judge,* dissents for the reasons stated in his dissenting opinion in Nos. 20212 and 20213, *Brotherhood of Railroad Trainmen* v. *St. Louis Southwestern Railway Company and Ralph T. Seward,* filed today.

APPENDIX "B"

Judgment Below.

Before: Bastian, *Senior Circuit Judge,* and Burger and Wright, *Circuit Judges.*

JUDGMENT.

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the District Court appealed from in these cases is hereby affirmed.

Per Circuit Judge Burger.

Dated: May 19, 1967.

Circuit Judge Wright dissents for the reasons stated in his dissenting opinion filed today in Nos. 20,212 and 20,213, *Brotherhood of Railroad Trainmen* v. *St. Louis Southwestern Railway Company and Ralph T. Seward.*

APPENDIX "C"

District Court Opinion Below.

This proceeding is an outgrowth of the arbitration directed by the Congress in respect to issues that brought this country to the brink of a nationwide railroad strike in August, 1963. The Court has before it a petition on the part of a group of railway employees, to impeach what may be called a supplemental award of the special Arbitration Board created by the Congress. This award consists of answers to questions submitted to the Board in respect to the interpretation, application and administration of the principal award of the Board previously rendered.

Originally the two principal issues in dispute between the Brotherhoods, consisting of railroad employees, and the railroads, were first, the status of firemen on freight trains following the shift from steam-powered locomotives to Diesel engines; and, second, the size and composition of train crews, or the "crew consist", in the jargon of the industry, resulting from technological advances. A special Act of Congress (Act of August 28, 1963, Public Law 88-108, 77 Stat. 129) prescribed a compulsory arbitration of these two problems and created a special arbitration board for that purpose. This board was directed to conduct its proceedings in accordance with the provisions of the Railway Labor Act, 45 U.S.C. § 158, which regulate arbitrations of labor controversies in the railroad industry. Its award was made subject to the limited judicial review accorded by the Railway Labor Act.

This special board, after conducting exhaustive hearings and thoroughly considering the evidence, rendered a comprehensive decision disposing of the two issues submitted to it. In an action to impeach the award, brought pursuant to 45 U.S.C. § 159 by some of the Brotherhoods representing railway employees, the decision was sustained by this Court, *Brotherhood of Loc. Fire. & Eng.* v. *Chicago B. & Q.*

R. Co., 225 F. Supp. 11.[1] The judgment of this Court was affirmed by the Court of Appeals for the District of Columbia Circuit, 118 U.S. App. D.C. 100, and certiorari was denied by the Supreme Court, 377 U.S. 918.

The Act of Congress, which created the special Board of Arbitration that became known as Arbitration Board No. 282, required it to follow the procedure prescribed generally for arbitration boards created under the Railway Labor Act, as defined in 45 U.S.C. § 158. Paragraph (m) of that Section provides that any differences arising as to the meaning or the application of any provision of an award, shall be referred back to the Board for a ruling. Accordingly, Arbitration Board 282 has reconvened from time to time to interpret and construe its award in connection with specific questions that have arisen in the course of its application and administration.

The basic award of Board No. 282 made on November 26, 1963, may be divided into two parts. One dealt with the status of firemen on Diesel engines on freight trains. This subject is not before the Court at this time. The other aspect of the award was devoted to the size and composition of train crews, i.e., "crew consist" in the parlance of the industry. This problem had numberless ramifications, since situations vary from train to train and might run into thousands. Manifestly, it would not have been practicable for the Board, especially in the short time at its disposal, to determine the size and composition of the train crew on every train throughout the country. Moreover, the nature of the problem was such as to require flexibility for alterations that may be necessitated by changes in conditions on any specific run from time to time. The Board solved the problem by formulating a series of concrete principles to govern the determination of "crew consist"

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[1] The opinion of this Court cited in the text summarizes the history of the controversy and the provisions of the award in some detail.

in individual instances. It provided that proposals for changes in existing written or oral rules should be initiated by notices and handled by negotiations. If no agreement was reached, the matter was to be referred to a special board of adjustment to be selected and convened as prescribed in detail in the award. As heretofore stated, in the action brought to impeach it, the award was sustained by this Court in every respect and the judgment of this Court was affirmed by the Court of Appeals.

Pursuant to the award, such special boards of adjustment were later created for the purpose of solving individual controversies involving the size and composition of crews on individual trains on various railroads. From time to time Board No. 282 was reconvened and rendered supplemental rulings governing activities of these special boards.

The matter now before the Court is an attempt by certain of the Brotherhoods to impeach or set aside several answers of the Board to questions submitted to it by the parties. The present proceeding is brought under 45 U.S.C. § 159, which accords a limited judicial review of an award of an Arbitration Board created under the Railway Labor Act. It has been instituted by a petition filed both in the action that had been originally brought to impeach the basic award, and in a new separate action filed to attack the supplemental award consisting of the answers to which we have just referred. The two petitions, which are practically identical, have been consolidated for a hearing.

The scope of judicial review of an arbitration award under the Railway Labor Act is narrowly limited and restricted. It extends solely to the following matters: failure of the award to conform to the substantive requirements prescribed by the Act; failure of the proceedings to conform to the provisions of the Act; failure of the award to conform or confine itself to the stipulations of the agreement to arbitrate; and, fraud or corruption of a member of the Board or of a party to the arbitration, 45 U.S.C. § 159,

paragraph Third. Unlike reviews of decisions of administrative agencies generally, the Court is not vested with any authority to examine the evidence, or to determine whether the findings of the Arbitration Board are sustained by substantial evidence. The Arbitration Board is thus clothed with plenary and final power to determine the controversy provided it adheres to the requirements of law to which reference has just been made. It may perhaps be assumed, without deciding that the Court might possibly be empowered to set aside a ruling or interpretation of the Board that is so unreasonable on its face as to be adjudged arbitrary or capricious. This question, however, does not arise in this proceeding.

The supplemental award now questioned was rendered by Arbitration Board No. 282, on October 10, 1965, and consists of answers to specific questions submitted by parties to the arbitration in regard to the construction and application of the award. The answers in controversy are in response to Questions No. 32, 33 and 36, which relate to the activities of special boards of adjustment created pursuant to the direction of Board No. 282, for the purpose of determining individual disputes as to the composition and size of train crews in specific instances.

A preliminary statement contained in the present award of the Board pointedly summarizes and comments on the issues in controversy, as follows (pp. 10, 11, 12 and 13):

> "The organizations affected by the Award argue that these special boards of adjustment are bound by the rules applicable to the statutory arbitration boards provided for in Section 7 of the Railway Labor Act. We reject that contention as completely erroneous. Section 7 First of the Act provides for a board of either three or six persons; our Award stipulates a board of three. Section 7 Third (f) requires that the arbitration board shall furnish a certified copy of its award to the respective parties to the controversy, and

shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified by at least a majority of the board, to the clerk of the federal district court for the district in which the controversy arose, and that certified copies shall also be filed with the National Mediation Board and the Interstate Commerce Commission. Our Award imposes no such requirements. Thus, the logic of the organizations' argument forces them to concede that an award rendered by a special board of adjustment pursuant to the procedures and guidelines laid down in Award 282, which has been accepted by the parties and put into effect, can nevertheless be voided by either party at some future date because certified copies of the record were not filed with the court, the Mediation Board, and the Commission. We think such a conclusion is plainly contrary to the letter and the spirit of award 282. (pp. 10-11)

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"It is true that Section 4 of Public Law 88-108, which established Board 282, states that 'To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of the said Act.' We think it clear that the quoted language applies only to Board 282 and not to the special boards of adjustment provided for in its Award. (p. 12)

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"We do affirm, . . . that it was never our intention that the special boards of adjustment for which we provided would be subject to Sections 7 and 8 of the Railway Labor Act." (p. 13)

We now take up the individual questions in controversy. Question 32(c) enquires whether the awards of the special

boards of adjustment were void because (1) the notices served by the carrier were defective; and (2) the carriers did not negotiate with the Brotherhood in good faith, as required by the original direction of Board No. 282. The Board answered that the notices were not defective, except for a closing phrase which makes them applicable to assignments that might be thereafter established. The Board holds that this phrase, which refers to non-existing assignments, should not have been adopted by the special boards of adjustment, and that this provision is void, but does not vitiate the remainder of the award.

It was argued by counsel that the Board erred as a matter of law in that the Railway Labor Act, 45 U.S.C. § 159, paragraph Fourth, provided that if a part of the award is held invalid, the entire award should be set aside. This point is lacking in merit. Section 159 applies solely to the award of the statutory Board of Arbitration. The awards here in question were made by the special boards of adjustment locally created pursuant to the provisions of the original award. These special boards are not within the scope of the Railway Labor Act.

This Court has already held that the provisions of the Railway Labor Act are not applicable to the special boards of adjustment. It was stated by this Court *In re Certain Carriers, etc.*, 231 F. Supp. 519, 521:

> "It is then claimed that the boards did not follow the prescribed procedure, and that, therefore, the awards should be set aside. This contention is predicated on the major premise that the provisions of the Railway Labor Act governing the procedure of an arbitration board are applicable to these local adjustment boards. To be sure, the provisions of the Railway Labor Act, found in 45 U.S.C. §§ 158, 159, were binding on the special Board of Arbitration created by the Act of Congress, and those provisions were complied with. The Court is of the opinion, however,

that they are not applicable to the special boards of adjustment created under the award.

"These special boards are creatures of the Arbitration Board and not of any statute."

As to the second part of this question, Board No. 282 stated:

"On the basis of the record before it, the Board finds no evidence that the carrier failed to negotiate in a manner consistent with the intent of the Award of Board 282."

Question 32(d) enquires whether an award of a special board of adjustment relating to assignments of baggagemen is null and void on the theory that the special board has no jurisdiction over baggagemen on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, because they were governed by a separate agreement rather than by the "crew consist" rule. The Board replied that the special board of adjustment had jurisdiction over these assignments, because they were covered by a rule established by an agreement within the meaning of the original award. Section III, part A(2) of the basic award, which relates to changes in rules requiring the use of a stipulated number of trainmen, specifically enumerates the categories of trainmen that are covered, to wit, assistant conductors, ticket takers, *baggagemen,* brakemen, or firemen. (Emphasis supplied.)

Question 33 enquires whether the Chicago, Milwaukee, St. Paul and Pacific Railroad Company violated the provisions of the original award of Board No. 282, by reducing the size of crews on certain trains, without following the prescribed procedure. The Board ruled in effect that the procedure established by the Board for attempts to change the size of a crew, was by its very terms applicable to situations in which there were rules fixing the size of

the crew in effect on the effective date of the award, irrespective of whether such rules were established by agreement, interpretation, or practice. The procedure was not applicable in case there was no existing rule. The Board further held that if there was a dispute whether a rule existed immediately prior to the effective date of the award, an issue of fact was created to be determined under the existing procedure provided by the Railway Labor Act for the settlement of "minor" disputes, i.e., by the National Railroad Adjustment Board, created under 45 U.S.C. § 153.

Question 36(a) enquires whether certain notices of proposed changes in the size and composition of train crews were served prematurely, and, second, whether they were defective on the theory that they were too broad. Board No. 282 answered each of these questions in the negative. On the oral argument before this Court, objections to the first part of the answer were abandoned. The objection to the form of the notices was, in effect, that the notices covered groups of runs, rather than specific runs. The Board held these notices to be proper and this Court had previously reached the same conclusion, *In re Certain Carriers, etc.*, 231 F. Supp. 519, 521.

Questions 36(b) and (c) renewed in a different form the objections to the procedure followed by the local boards, which has been already discussed.

Question 36(d) enquires whether there was substantial evidence to support the awards of each of the special boards of adjustment and whether each of the awards confines itself and conforms to the guidelines of the basic award of Board No. 282. The answer of the Board is as follows:

> "The essential criterion is not whether there is substantial evidence to support the awards of the special boards of adjustment but rather whether there is substantial evidence to show that the special boards of

adjustment failed to apply or to confine themselves to the guidelines prescribed by the Award of Board 282. On the basis of the record before it, the Board finds no evidence that the special boards failed to comply with the requirements of the Award."

It must be borne in mind that this Court may not review the question whether there was substantial evidence to support the awards of the individual special boards, nor may Board No. 282 do so. The scope of judicial review under the Railway Labor Act is much narrower than that in respect to decisions of administrative agencies generally, as has already been shown.

The principal attack on the decisions of the special boards of adjustment, is that the proceedings conducted by these tribunals were informal and that no stenographic record was made of the testimony. The United States was, without objection, permitted to intervene in the present action. Counsel for the Government at the oral argument informed the Court that practically all of these boards proceeded in the same manner and that no stenographic records were kept by most if not all of them. He called attention to the fact that at this late date if this mode of procedure were held to be in violation of law, it would be necessary to set aside and vacate all of the rulings of the special boards and to require them to conduct new hearings. The result would be delay and expense with possible detriment to both sides of the controversy. It does not appear that the Brotherhoods either requested the boards to proceed in any other manner, or that they moved that a stenographic record be kept of the testimony. It is not unlikely that if such a request had been made at the beginning, it might well have been complied with. It is not appropriate for them to raise the objection at this late date after remaining silent while the special boards were in operation.

The question before this Court, is, of course, not what this Court would have held in each individual instance on

a trial *de novo*. It is merely whether Board No. 282 exceeded its power, committed some error of law, or acted arbitrarily or capriciously. No basis is perceived for setting aside the rulings of the Board. This Court is of the opinion that the decisions of Board No. 282 involved in this proceeding, were entirely valid and proper and should be sustained.

The petition to impeach the award consisting of the answers to questions here in issue, is dismissed.

ALEXANDER HOLTZOFF
United States District Judge.

January 12, 1966.

APPENDIX "D"

Question No. 33 and Answer of Board 282 to Question No. 33.

B.R.T. Question No. 33:

Did the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Line East) violate the provisions of Award #282 by reducing the crew consist of a conductor and two brakemen to a conductor and one brakeman:

(a) On certain main line freight trains,

(b) On certain branch line freight trains, and

(c) On certain main line passenger trains,

without complying with Article III of the Award rendered by Arbitration Board 282, made pursuant to Public Law 88-108, 88th Congress S.J. Res. 102, enacted August 28, 1963.

Answer:

Section III, Part A(2) of the Award bars changes in the scope or application of "rules" in effect immediately prior

to the effective date of this Award requiring a stipulated number of trainmen, whether such "rules" were established by agreement, interpretation or practice. Where no such "rule was in effect immediately prior to the effective date of the Award, this bar does not apply. The Board does not construe the statement by Judge Miller, relied on by the Brotherhood, as a holding to the contrary. Judge Miller said, referring to an earlier opinion by Judge Holtzoff, that "it has been judicially determined that the language . . . [of] Subsection A(2) of Section III of the Award means that no change shall be made for the time being in the composition of any train crew except through the procedures set up in the Award." This construction is applicable only to situations in which there were rules in effect immediately prior to the effective date of the Award which required a stipulated number of trainmen. As the Board indicated in its answer to B.R.T. Question 18, the question of whether such a rule was or was not in effect immediately prior the effective date of the Award raises an issue of fact to be determined under existing procedures of the Railway Labor Act for the settlement of "minor" disputes. The Board notes the willingness of the Carrier to expedite the determination of this issue of fact in the present case.

APPENDIX "E"

Public Law 88-108, 77 Stat. 132

"Sec. 1. That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over and dispute arising from any of such notices. Any action heretofore taken which would be prohibited by

the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

"Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof [Aug. 28, 1963] each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution [Aug. 28, 1963]. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

"Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which

the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as 'Use of Firemen (Helpers) on Other Than Steam Power' and 'Consist of Road and Yard Crews' and that portion of the organizations' notices of September 7, 1960, identified as 'Minimum Safe Crew Consist' and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

"Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act [this section and section 158 of this title], the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act [section 159 of this title]. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

"Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

"Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

"Sec. 7.

"(a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

"(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

"Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment [Aug. 28,

1963], except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

"Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby."

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 501

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY IN OPPOSITION.

Opinions Below

The opinion of the Court of Appeals (App. A of Petition), not yet officially reported, is unofficially reported at 55 CCH Labor Cases ¶ 11,931. The opinion of the District Court (App. C of Petition) is reported at 248 F. Supp. 1008.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether the ruling by Arbitration Board No. 282, in answer to BRT Question No. 33, that its Award does not bar unilateral changes in crew consist in situations where the carrier's rules prior to the Award did not require the use of a stipulated number of trainmen, is a permissible interpretation of the Award?

Statement of the Case

In November of 1959, most of the nation's Class I railroads served five unions (including petitioner) with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of proposed changes in a number of obsolete rules which were causing serious overmanning of trains. One of the proposals thus made was to abolish all rules requiring the use of trainmen (such as brakemen and helpers) in road and yard service, and to permit management to determine the number of such trainmen to be used in its discretion. In September of 1960, the unions served the railroads with Section 6 notices of various counterproposals, including a proposal by petitioner to establish a rule requiring the use of at least two trainmen on all crews in road and yard service. The parties exhausted the "major" dispute procedures of the Railway Labor Act (45 U.S.C. §§ 151-160) without settling this dispute, and thus were in a position to resort to self help including strikes by the unions. See *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

To prevent such a disaster, Congress enacted P.L. 88-108 (77 Stat. 132). That statute committed the crew-consist issue raised by those aspects of the Section 6 notices referred to above and another issue involving the use of locomotive firemen to final and binding arbitration by an arbitration board commonly known as Arbitration Board No. 282. The crew-consist provisions of the Award by

Board 282 (JA 5-10) established a procedure whereby existing rules requiring a stipulated number of trainmen could be changed, with the exception of rules requiring the use of two trainmen in mainline road service.[1] Since the procedure was applicable only to proposed changes "in the scope or application of rules . . ., whether established by agreement, interpretation, or practice, which require a stipulated number of trainmen" (JA 5), in those situations in which no rule required the use of a stipulated number of trainmen on road or yard crews, the carrier could continue to change the number of trainmen on such crews in its discretion without going through the procedure established by the Award.

P.L. 88-108 provided, among other things, that the Award by Board No. 282 should constitute a "complete and final disposition" of the portions of the 1959 and 1960 Section 6 notices raising the crew-consist and firemen issues (§3), that the arbitration should "be conducted pursuant to sections 7 and 8 of the Railway Labor Act" (§4), and that "the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act" (§4). Petitioner and three other unions filed petitions to impeach the Award, pursuant to Section 9 of the Railway Labor Act (45 U.S.C. § 159) as incorporated into P.L. 88-108, and contended, among other things, that the crew-consist provisions of the Award did not constitute a "complete and final disposition" of the crew-consist issue within the meaning of that requirement in P.L. 88-108. That contention was rejected, however, and the validity of the Award was sustained. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B.*

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[1] In general, the procedure thus established permitted either a carrier or a union to give written notice of proposed changes, provided for conferences upon the proposals and, if no agreement was reached, for submission of the dispute to a special board of adjustment for final and binding decision pursuant to certain guidelines or standards set forth in the Award.

& Q. R. Co., 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

Section 8(m) of the Railway Labor Act (45 U.S.C. § 158 (m)) provides that "any difference arising as to the meaning, or the application of the provisions, of an award by a board of arbitration shall be referred back for a ruling to the same board . . .; and that such ruling when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award. . . ." See, also, 45 U.S.C. § 157 Third (c). It has been established that Section 8(m), as incorporated into P.L. 88-108, is applicable to Board 282 and its Award. *E.g., New York, C. & St. L. R. Co.* v. *Brotherhood of Loc. Fire. & Eng.*, 358 F. 2d 464 (6th Cir., 1966); *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.*, 349 F. 2d 207 (D.C. Cir., 1965); *Brotherhood of Railroad Trainmen* v. *Chicago, M., St. P. & P. R. Co.*, 345 F. 2d 985 (D.C. Cir., 1965). Hence, as those cases hold, issues as to the meaning or application of Award 282 must be initially decided by Board 282 rather than by the courts. And, unless impeached in the manner and within the time required by Section 9 of the Railway Labor Act, the rulings of Board 282 become a part of its "original award" with "the same force and effect as such original award." Such rulings should not be impeached unless inconsistent with any reasonable interpretation of the original award, so as to constitute an amendment thereof or a new award rather than an interpretation of the original award. *Order of Railroad Telegraphers* v. *New York Central R. Co.*, 181 F. 2d 113 (2d Cir., 1950); *Mid-Continent Airlines* v. *Brotherhood of Railway, Etc.*, 83 F. Supp. 976 (W.D. Mo., 1949).

As we have noted, on its face Award 282 requires that the procedures established therein be followed only with respect

to proposed changes in existing rules requiring the use of a stipulated number of trainmen on crews in road or yard service; where the existing rules leave the number of trainmen on such crews to managerial discretion, the carrier can continue to change the number of trainmen in the exercise of its discretion without going through the procedures established by the Award. Hence, when a dispute arises as to whether the existing rules require a stipulated number of trainmen or permit a carrier to change the number of trainmen in its discretion, the issue presented concerns the interpretation of the existing rules rather than the interpretation of Award 282. And, it has long been established that issues as to the interpretation of such rules are within the exclusive jurisdiction of the National Railroad Adjustment Board or a special board of adjustment established under Section 3 of the Railway Labor Act (45 U.S.C. § 153). *E.g., Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 38 (1963); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950).

Shortly after Award 282 became effective (on January 25, 1964), a dispute arose between two unions (petitioner and the Order of Railway Conductors & Brakemen) and the respondent railroad as to whether respondent's rules in effect prior to the Award required a stipulated number of trainmen on certain crews. The unions contended that such a rule had been established by practice, and therefore that the number of trainmen on such crews should not be changed except pursuant to the Award. Respondent contended, on the other hand, that it had the right to change the number of trainmen on such crews in its discretion. The unions submitted this dispute to Board 282 (in three substantially identical questions) which ruled that it did not involve an interpretation of the Award, but rather an interpretation of the existing rules, and thus should be decided under the "minor" dispute procedures (Section 3) of the Railway Labor Act. Answers on May 17, 1964, to BRT Question No.

18 and to ORC&B Question No. 1; Answer, on June 9, 1964, to BRT Question No. 17 (JA 11-13; see JA 31-32).

Neither petitioner nor the ORC&B sought to impeach those rulings, so that they became a part of the Award (see p. 4, *supra*) and were "final and conclusive on the parties," 45 U.S.C. § 159 Second. Nevertheless, when a similar dispute subsequently arose between petitioner and the respondent railroad with respect to certain other crews, petitioner once again sought to have Board 282 decide the dispute rather than proceed under the procedures established pursuant to Section 3 of the Railway Labor Act, by submitting BRT Question No. 33 to the Board.

While BRT Question No. 33 was pending, petitioner filed a motion for supplemental relief against the respondent railroad under the judgment entered on Award 282 in the United States District Court for the District of Columbia (JA 22-23). Petitioner contended, in a supporting affidavit (JA 23-26), that a rule requiring a stipulated number of trainmen on certain crews had been established by practice, while opposing affidavits filed by respondent (JA 26-37) demonstrated that there was no such rule and that the number of brakemen to be used was determined by management in accordance with its judgment as to the needs of the service. In the course of argument upon that motion, however, petitioner contended for the first time that the Award should be interpreted as prohibiting any unilateral changes in crew consist even though a stipulated number of trainmen is not required by a rule established by practice or otherwise. This argument, which was based upon a contention that the Award had been so interpreted in the opinion of the District Court upholding the validity of the Award, did raise an issue as to the interpretation of Award 282.

Consequently, the District Court withheld any ruling upon the motion for supplemental relief pending a ruling by Board 282 upon the issue thus raised by petitioner (JA

43), and, on August 11, 1965, petitioner submitted a Supplemental Filing to Board 282 in which the Board was requested to rule upon that issue in its answer to BRT Question No. 33.[2] In its Answer, on October 10, 1965, to BRT Question No. 33 (App. D to Petition; JA 65-66), the Board ruled, among other things, that:

> "Section III, Part A(2) of the Award bars changes in the scope or application of 'rules' in effect immediately prior to the effective date of this Award requiring a stipulated number of trainmen, whether such 'rules' were established by agreement, interpretation or practice. Where no such 'rule' was in effect immediately prior to the effective date of the Award, this bar does not apply."

The Board also ruled that it did not construe the statements in the opinion upholding the Award "as a holding to the contrary" of its view that the bar in Section III-A(2) of the Award "is applicable only to situations in which there were rules in effect immediately prior to the effective date of the Award which required a stipulated number of trainmen." And, the Board reiterated its earlier ruling in "answer to B.R.T. Question 18, [that] the question of whether such a rule was or was not in effect immediately prior to the effective date of the Award raises an issue to be determined under existing procedures of the Railway Labor Act for the settlement of 'minor' disputes."

On October 20, 1965, shortly before filing a petition to impeach the Answer to BRT Question No. 33 (on October 22, 1965), petitioner moved for a further hearing on its

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[2] The "Supplemental Filing" by petitioner is in the record as Exhibit D to the Affidavit of Richard T. Conway, filed on December 30, 1965. Petitioner conceded therein (page 1) that its contention as to the interpretation of the Award was contrary to a "literal reading" of the Award and of the Board's prior Answer to BRT Question No. 18.

motion for supplemental relief, which motion was said to be "ripe for further hearing, consideration, and adjudication in the light of the said Answer, the earlier hearing, and the briefs and affidavits heretofore filed" (JA 107-108). Petitioner thus elected to have its motion for supplemental relief decided prior to a determination of the impeachment petition, even though the District Judge made clear at the outset that in such circumstances he was required to enforce the Award as interpreted by the Board in its Answer to BRT Question No. 33 (JA 119-120). Since to "grant the relief asked for" in the motion "would be, in effect, setting aside or ignoring the answer" to BRT Question No. 33 (JA 124), the motion was denied (JA 124-125). In the course of the hearing upon the motion, the District Judge made clear that he had not intended, in his opinion upholding the Award, to interpret the Award in the manner contended by petitioner (JA 120-122).

The petition does not raise any issue concerning the order denying the motion for supplemental relief, which order also was not questioned in petitioner's brief in the Court of Appeals (although an appeal was noted). Rather, the petition is concerned solely with a subsequent order by the District Court (JA 159-160) upholding the answer to BRT Question No. 33 (and also the answers to BRT Questions No. 32(c) and (d) and 36), and with the affirmance of that order by the Court of Appeals. In its opinion, the Court of Appeals pointed out that there "is obviously no difference between the Award and the Board's interpretation of it" (Pet., App. A, at 2a) as barring changes only in rules requiring a stipulated number of trainmen (except pursuant to the procedures established by the Award), rather than as barring changes in crew consists even where there is no such rule. And, the court below rejected petitioner's contention that the opinion upholding the validity of the Award had construed the Award to the contrary (*id.*, at 2a-3a).

Argument

The court below noted that "this case is merely the latest manifestation of a litigation syndrome that seems to keep the railroads and various governmental entities in the courts on an ancient issue" (Pet., App. A, at 1a). The symptoms of petitioner's "litigation syndrome" apparently have become even more manifest. Petitioner has filed two petitions for writ of certiorari from the judgment in the proceeding below—this petition and No. 500. Both of those petitions appear to us to be without substance, as we demonstrate herein with respect to the instant petition.

Petitioner does not even raise in this Court the issue which it pressed below—whether or not Board 282 properly interpreted the language of its Award by its ruling, in answer to BRT Question No. 33, that the requirement that no changes be made in the existing rules requiring a stipulated number of trainmen except pursuant to the procedures established by the Award did not bar changes in the consist of crews as to which the existing rules did not require a stipulated number of trainmen. Instead, petitioner requests this Court to grant certiorari to review a contention that the Award as so interpreted is invalid because it does not comply with P.L. 88-108.

One can understand why petitioner has not raised here the issue which was pressed below. As the court below pointed out in effect, Board 282 simply interpreted its Award to mean exactly what it says. Section III-A(2) of the Award provides that no "change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award . . . which require a stipulated number of trainmen . . ., except by agreement or pursuant to the provisions of this Award" (JA 5). Thus, it has always been plain that where "no 'rule' was in effect immediately prior to the effective date of this Award, this bar does not apply" as Board 282 stated in its Answer to BRT Question No. 33. See pp. 3, 4-6, *supra*.

The issue as to the validity of the Award which petitioner seeks to raise in this Court, however, is equally insubstantial. Under Section 9 Second of the Railway Labor Act, as incorporated in Section 4 of P.L. 88-108, issues as to the validity of the Award had to be raised in an impeachment petition filed within 10 days after the Award was filed with the district court.[3] As noted in our Statement of the Case (pp. 3-4 *supra*) petitioner and the other unions did seek to impeach the validity of the Award. One of the contentions made then, as now, was that the Award did not make a "complete and final" disposition of the crew-consist issue as required by P.L. 88-108, although at that time petitioner based that contention upon the provisions in the Award permitting rules requiring a specified number of trainmen to be changed in accordance with procedures specified in the Award.

As we have noted (p. 3, *supra*) the petition to impeach the Award was denied and the validity of the Award under P.L. 88-108 and otherwise was upheld in a decision which became final in 1964. That decision, consequently, is *res judicata* of all issues as to the validity of the Award whether or not raised at the time. See, *e.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948); *Heiser* v. *Woodruff*, 327 U.S. 726, 735-736 (1946). A ruling by Board 282 as to the meaning of its Award is subject to impeachment if that ruling is not a reasonable interpretation of the language of the Award. See p. 4, *supra*. But the validity of the Award itself is no longer subject to question. See *Brotherhood of Railroad Trainmen* v. *Missouri Pacific R. Co.*, 230 F. Supp. 197, 201 (E.D. Mo., 1964). Indeed, the court below so held

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[3] "An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties." 45 U.S.C. § 159 Second.

(Pet. App. A., at 3a-4a) with respect to that aspect of the case which has been made the subject of the petition in No. 500.[4]

In any event, Award 282 obviously disposed of the crew-consist aspects of the 1959 and 1960 notices insofar as they concerned those situations in which the existing rules did not limit the discretion of a carrier in fixing the consist of its crews. The Award did so by preserving those situations just as it did with respect to situations in which the existing rules required the use of two trainmen on mainline road crews (an aspect of the Award favorable to petitioner). It obviously was not unreasonable for Board 282 to decide that permitting a carrier to continue to change the consist of crews in its discretion is consistent with "adequate and safe transportation on service" where a carrier had been exercising such discretion for many years prior to the Award, but in any event petitioner's contentions in that regard (Pet., at 5) are irrelevant since the merits of the substantive provisions of the Award are not subject to judicial review at any time, as 45 U.S.C. § 159 Second expressly provides. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11, 17-18 (D.D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964). And, of course, a dispute as to whether or not the rules in effect prior to the Award required the use of a stipulated number of trainmen involves an interpretation of those rules, rather than of the Award, as Board 282 has repeatedly held. See pp. 5-6, *supra*.

We submit, therefore, that the judgment below is clearly correct. But even if there should be some doubt about the correctness of that judgment, petitioner does not even claim that it conflicts with a decision of this Court or of some other

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[4] Petitioner did contend in the court below that the Award as interpreted by the ruling of Board 282 involved in that aspect of the case was invalid.

court of appeals and the issue presented does not possess any general importance such as might justify an exercise of the Court's discretionary certiorari jurisdiction. In their opinion concerning the Award, the Neutral Members of Board 282 noted that only "a relatively few carriers are unrestricted in determining the size of crews. . . ." *Opinion of Neutral Members*, 41 Labor Arbitration 680, 693 (1963). And, of course, the Award by Arbitration Board No. 282 was tailored to the particular circumstances presented to that Board, so that there is no likelihood that similar issues will arise out of some future arbitration award as petitioner speculates (Pet., at 4).

Finally, petitioner always has possessed an adequate remedy for its basic contention that respondent's rules require the use of a stipulated number of trainmen on the crews in question. Not only could its claims in that regard have been submitted to the National Railroad Adjustment Board, but there also has been available a special board of adjustment established by the parties on the property of the respondent railroad pursuant to 45 U.S.C. § 153 Second. Respondent has repeatedly offered to join with petitioner in obtaining an expedited determination of the merits of its claim by that means (see JA 31), but petitioner has refused even to file a claim. If petitioner had taken advantage of that offer and a final determination had been reached that respondent is required by its rules to use a stipulated number of trainmen on the crews in question, respondent would have been required to use such number of trainmen on those crews and to compensate in damages any employee who submitted a timely claim and established that he was injured by past failures to use that number of trainmen. Petitioner's refusal to utilize that remedy indicates very strongly that petitioner has no confidence in its claim that respondent's rules require the use of a stipulated number

of trainmen on the crews in question—a lack of confidence which we believe is more than justified.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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